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803
No. 2244

IN THE
United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

THEODORE WEISBERGER, MAUDE WEISBER-
GER, his wife, and THE EMPIRE STATE
SURETY COMPANY, a Corporation,
Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District
Court for the Eastern District of Washington,
Southern Division.

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CLERK.

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JAN 27 1913

Records of U.S. Circuit
Court of appeals
803



No.

IN THE
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UNITED STATES OF AMERICA,
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NAMES AND ADDRESSES OF ATTORNEYS
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and

E. C. MACDONALD, Esquire, Assistant United States Attorney, Federal Building, Spokane, Washington.

Attorneys for Plaintiff and Plaintiff in Error.

and

PARKER & RICHARDS, North Yakima, Washington,

Attorneys for Defendants Theodore Weisberger, et ux.

JOHN P. HARTMAN, Esquire, Seattle, Washington, and McAULEY & MEIGS, North Yakima, Washington,

Attorneys for Defendant Empire State Surety Company.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY, a Corporation,

Defendants.

ORDER.

It having been made to appear to the Court that the plaintiff will not have time to prepare, print, file and serve the record on appeal in the above-entitled cause within the time allowed under the rules of Court, to-wit: November 30, 1912, and it further appearing to the Court that it is proper and necessary to extend the time for doing so, now, therefore, on the application of the United States Attorney for the Eastern District of Washington, it is

ORDERED that the time within which the plaintiff may have to prepare, print, file and serve the record on appeal herein, is hereby extended to and including the 2nd day of January, A. D., 1913.

Done in open Court this 15th day of November, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order Extending Time for Printing Record on Writ of Error. Filed November 19, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEISBERGER and EMPIRE STATE SURETY COMPANY,

Defendants in Error.

It appearing to the Court that it is necessary to further extend the time for the plaintiff in error in the above entitled cause to prepare, file and serve the record on appeal, the time having been heretofore extended to January 2, 1913, now, therefore, it is hereby

ORDERED, under and pursuant to Rule Sixteen (16) of the Rules of the United States Circuit Court of Appeals, that the plaintiff in error shall have, and it is hereby allowed until and including the 20th day of January, A. D., 1913, in which to prepare, serve and file the Record herein with the Clerk of the United States Circuit Court of Appeals, at San Francisco, California.

Done in open Court this 19th day of December, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order extending time for printing record.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY, a Corporation,

Defendants.

AMENDED COMPLAINT.

Comes now the plaintiff, the United States of America, and leave of Court having been first had and obtained, files this, its Amended Complaint, and respectfully shows to the Court and alleges:

1. That this action is brought under the direction of the Attorney General of the United States, at the request of the Secretary of the Interior.

2. That the defendants Theodore Weisberger and Jane Doe Weisberger (whose christian name is unknown unto plaintiff) at all the times herein mentioned were, and now are, husband and wife, residing in the County of Yakima, in the Eastern District of Washington.

3. That the defendant Empire State Surety Company is a corporation, duly organized, created and existing under and by virtue of the laws of the State of New York, and engaged in the business of surety, that said defendant has fully complied with the Act of Congress approved August 13, 1894, relating to surety companies and the regulations described therein.

4. That under and by virtue of the Act of Congress approved June 17, 1902 (32 Stat. 388), the Secretary of the Interior of the United States authorized and directed the construction of what is known as the Tieton Reclamation Project, which consisted in part of the construction of a canal, all of which is located in the Tieton Canyon, in the County of Yakima, State of Washington; that in pursuance thereof, the Secretary of the Interior, on or about the 5th day of January, 1907, entered into a contract with the defendant Theodore Weisberger, wherein and whereby the said defendant agreed to supply material, excepting cement and reinforcing steel, and to manufacture reinforced concrete shapes of various specified standard sizes to form a lining for said canal in open cuts and tunnels, and to construct elevated flumes at various specified points along said canal, all of which was to be executed at certain specified points in the Tieton Canyon, all of said work being more particularly described in Schedule 6A of said contract; and the defendant also, in said contract, agreed to load, handle and transport the said concrete shapes to the points of final disposal in the canal, tunnels and flumes; to

set shapes in position and to bed, backfill, joint and otherwise secure them in place as required by plaintiff's engineers in charge, and otherwise to complete said canal ready for the introduction of water; the said work being more particularly described in Schedule 7A of said contract, a copy of which contract, certified to by the Secretary of the Interior under date of November 15, 1910, is attached hereto and made a part hereof.

5. That in consideration of the promises and agreements of the defendant as aforesaid, and the fulfillment thereof by him, the plaintiff agreed to pay unto him the sum of Nine Dollars (\$9.00) per cubic yard for concrete shapes for canal and tunnel lining, flumes and flume supports (being for the work embraced in said Schedule 6A); One Dollar and Forty-nine cents (\$1.49) per linear foot for laying concrete shapes in open canal; One Dollar and twenty-five (\$1.25) cents per linear foot for laying concrete shapes or flume supports; Two Dollars and thirty-seven cents (\$2.37) per linear foot for erecting flume supports single story; Three Dollars and seven cents (\$3.07) per linear foot for erecting flume supports double story; Four Dollars and twenty-one cents (\$4.21) per linear foot for erecting flume supports triple story; One Dollar and forty-four cents (\$1.44) per linear foot for laying concrete shapes in tunnel; Twenty cents (\$.20) per linear foot for dry stone filling in tunnel 1—Type A; Fifty-four cents (\$.54) per linear foot for dry stone filling in Tunnel—Type B; Sixty-one cents (\$.61) per linear foot for dry

stone filling in tunnel—Type C, and Twenty-three cents (\$.23) per linear foot for dry stone filling in tunnel—Type D (being the work embraced in Schedule 7A). It was further understood and agreed that the prices to be paid for work under Schedule 7A, as aforesaid, would be the unit prices quoted in said contract, less one (1) per cent. in case contract is awarded for Schedules 6A and 7A; that the contract for both of said Schedules was awarded to Theodore Weisberger.

6. That under and in pursuance of said contract, the defendant entered upon said work so as aforesaid agreed to be performed by him, but the said defendant did not complete the same, but on the contrary and previous to the first day of January, 1908, the said defendant failed to prosecute the said work in such manner as to insure a full compliance with the contract within the time fixed therein, or at all, and abandoned the same and all work thereunder without any just cause therefor; that thereupon, and on or about the 2nd day of January, 1908, notice in writing was served upon said defendant by the Engineer in charge of said work (acting in that behalf under the direction of the Secretary of the Interior), requiring and directing the said defendant, within ten days therefrom, to proceed with the performance of said contract in accordance with its terms; that the defendant, without any just cause, failed, neglected and refused to proceed with said contract or to do anything further therein; that thereafter, and on or about the first day of February,

1908, the Secretary of the Interior, under the power reserved to him in said contract, did suspend the operation thereof, and on said last named date so notified the defendant in writing; that thereupon the plaintiff, through its officers, agents and employes, entered upon the completion of said work and completed the same in accordance with the terms and conditions contained in the plans and specifications thereof.

7. That by reason of the neglect, failure and refusal of the defendant Weisberger to perform the terms and conditions of said contract so as aforesaid devolving upon him, the plaintiff was compelled to, and did expend the sum of Fifty-one Thousand Ninety-five and Five Hundredths Dollars (\$51,095.05) for the completion of said work in excess of the amount for which the said defendant agreed to perform the same; that after the completion of the work contemplated by said contract an accounting, to determine the cost of the construction of said work, was made in pursuance of the terms of said contract, which account is hereto attached and made a part hereof.

8. That on or about the 5th day of January, 1908, the defendant Weisberger, as principal, and the defendant corporation, as surety, did make, execute and deliver unto the plaintiff their bond in the penal sum of Forty-five Thousand Dollars (\$45,000.00), wherein and whereby the defendant corporation did promise, agree and guarantee that the defendant Weisberger should well and truly observe, perform, fulfill, accomplish and keep all and singular the covenants, conditions and agreements devolving upon him under the contract

aforesaid, and agreed to hold harmless the plaintiff from any loss it might sustain by reason of any default of the defendant Weisberger therein, a copy of said bond, certified by the Secretary of the Interior under date of November 15, 1910, being attached hereto and made a part hereof.

WHEREFORE, Plaintiff prays judgment against the defendants Weisberger in the sum of Fifty-one Thousand Ninety-five and Five Hundred Dollars (\$51,095.05) and against the defendant Empire State Surety Company in the sum of Forty-five Thousand Dollars (\$45,000.00), with interest from the first day of January, 1908, together with its costs and disbursements herein.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

(Signed) RALPH B. WILLIAMSON,

Special Assistant United States Attorney.

Endorsements: Receipt of copy acknowledged without waiver of any objections to filing.

(Signed) PARKER & RICHARDS,

Attorneys for Defendant Weisberger.

Service made and copy received this 17th day of February, 1912.

(Signed) PARKER & RICHARDS,

Attorneys for Defendant Weisberger.

(Signed) McAULEY & MEIGS,

Attorneys for defendant Empire State Surety Company.

Amended Complaint filed February 19, 1912.

W. H. Hare, Clerk, by Edward E. Cleaver, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, and JANE DOE
WEISBERGER, Husband and Wife, and the
EMPIRE STATE SURETY COMPANY,
Defendants.

ANSWER TO AMENDED COMPLAINT.

Come now the defendants, Theodore Weisberger and Maude Weisberger (sued under the name of Jane Doe Weisberger), husband and wife, and in answer to the amended complaint filed by the plaintiff herein at the trial, by leave of Court file this, their third amended and supplemental answer to said amended complaint, and admit, deny and allege as follows:

I.

For answer to paragraphs 1, 2, 5 and 8 of said amended complaint, answering defendants admit the same.

4.

For answer to paragraph 4 of said amended complaint, these answering defendants admit, that under and by virtue of the Act of Congress approved June 17th, 1902, the United States, plaintiff in the above-entitled action, and the defendant, Theodore Weisberger, on or about the 5th day of January, 1910, entered into a contract, whereby the defendant, Theodore Weisberger, agreed to supply material excepting cement

and reinforcing steel, and to manufacture reinforced concrete shapes, of various sizes and designs as specified in said contract, to form a lining for a certain portion of the open canal, chute and tunnels, and to construct certain elevated flumes in the canal known as the Tieton Canal, described in said contract, as therein particularly specified and described; and said contract further provided that the defendant, Weisberger, should load, handle and transport the said concrete shapes so manufactured, to the places of intended use, and place the same in the portions of the said canal and tunnels, and construct the supports for certain flumes in accordance with the plans and specifications prepared therefor by the plaintiff's engineers, which plans and specifications were made a part of said contract, but deny each and every other allegation in said paragraph contained.

3.

For answer to paragraph 6 of said complaint, these answering defendants admit that the defendant, Theodore Weisberger, after the execution of said contract, entered upon the performance of said work so agreed to be performed by him as aforesaid; but deny each and every other allegation in said paragraph contained.

4.

For answer to paragraph 7 of said amended complaint, defendant denies that the plaintiff, by reason of the neglect, failure or refusal of the defendant, Theodore Weisberger, to perform the conditions of said contract devolving upon him, or at all, expended the sum of \$51,095.05, or any amount in the com-

pletion of said work in excess of the amount for which the said defendant agreed to perform the same; and denies that the plaintiff expended any sum or amount in the completion of any work embraced in any cotntract between the plaintiff and the defendants, or either of them.

Further answering said paragraph 7, defendant denies that after the completion of the work contemplated in the contract set out in plaintiff's amended complaint, or any time or at all, an accounting was made in pursuance of said contract, or any contract; and allege that the pretended accounting referred to in paragraph 7 of plaintiff's said amended complaint, was and is arbitrary, unwarranted, incorrect, unjust, and based upon estimates and not based upon actual expenditures made by the plaintiff or on account of the contract set up in said complaint, or any contract.

Further answering said paragraph, defendants allege that any work done by the plaintiff upon the Tieton Reclamation Project referred to in plaintiff's complaint, and for which said pretended accounting was made, was other and different work than that specified in the contract set out in plaintiff's amended complaint, and was not done in accordance with said contract, or the plans and specifications attached thereto and made a part of said contract.

FURTHER ANSWERING SAID AMENDED COMPLAINT AND FOR A FIRST AFFIRMATIVE DEFENSE TO PLAINTIFF'S CAUSE OF

ACTION HEREIN, THESE DEFENDANTS ALLEGE:

I.

That in the year 1906, the plaintiff, through its Secretary of the Interior, authorized and directed the construction of what is known as the Tieton Reclamation Project, mentioned in paragraph 4 of plaintiff's amended complaint herein. That prior to authorizing the construction of said project, the plaintiff, through its Secretary of the Interior and the officials of the Reclamation Service, made estimates of the number of acres of arid and irrigable land which would come under said project and which could be irrigated with water to be furnished from the irrigation works to be constructed in connection therewith, and determined the total acreage which could be so irrigated; and also estimated the cost of constructing said irrigation works and the cost per acre for water rights to be furnished therefrom, said cost being fixed at a price which it was estimated would reimburse to the plaintiff the entire cost of constructing said irrigation works.

2.

That after the authorization of the construction of said project, the plaintiff, through its officers and agents, caused the persons owning lands which would come under said irrigation project and be susceptible of irrigation therefrom, to form an association known as the Tieton Water Users' Association, and said land owners did, in the spring of the year 1906, organize such association and the same was duly incorporated under the laws of the state of Washington, said cor-

poration being organized and incorporated under the direction of the officers of the Reclamation Service; and the plaintiff, through its officers and agents, prescribed the form of the articles of incorporation and by-laws of said association and of the stock subscriptions and contracts to be entered into between said association and its members for acquiring stock therein and securing water for the irrigation of their lands. That in the form so prescribed, each share of stock represented a water-right for one acre of land, and, under the by-laws of the association, stock subscriptions and contracts made with the stockholders, each stockholder and member of said association subscribed for as many shares of stock in said association and agreed to take and pay for as many acre-water-rights as he had acres of land to be irrigated under said project, and pledged his land for the payment of said water-rights. That the number of shares of the capital stock of said association equaled the total number of acre-water-rights which it was estimated by the Government officials could be supplied from said Tieton project, and the price per share and per acre-water-right was originally fixed at Sixty Dollars (\$60.00), which amount was estimated to be sufficient to pay for the entire cost of said project, based on the estimate of such cost and the acreage to be irrigated made by the officials of the plaintiff. That the original estimates of the cost of constructing said irrigation works was far below the actual cost thereof and subsequently, at the request of the plaintiff and its officers, the members of said association increased the num-

ber of shares and the par value thereof so that the same should equal the total cost of the construction of said irrigation works. The total number of shares being fixed at thirty-four thousand (34,000), and the price per share at Ninety-three Dollars (\$93.00), making a total capitalization of Three Millions, One Hundred Sixty-two Thousand Dollars (\$3,162,000.00), that being the total amount expended in the construction of said irrigation works and in connection with said Tieton Project as finally determined by officers and agents of the plaintiff having said project in charge.

3.

That all of the capital stock of said association was subscribed by persons owning land coming under said irrigation project and such land owners entered into contracts for the purchase of all of said stock and the water-rights represented thereby, and bound themselves and pledged their lands for the payment thereof. The members of said association further agreed to furnish to the plaintiff free of cost, all rights of way necessary for the construction of said irrigation works.

4.

That after said association had been formed and its capital stock subscribed, the United States, through its Secretary of the Interior, entered into a contract with said association, wherein and whereby said association guaranteed the payments to the United States for that part of the cost of the said irrigation works which should be apportioned by the Secretary of the

Interior to its share-holders and agreed to collect from the share-holders and pay over to the Government the moneys necessary to reimburse the plaintiff from the cost of said works. That each individual stockholder in said association entered into an agreement with the association wherein and whereby it was agreed that the amount of his stock subscription, which represented the number of acre-water-rights which he was to receive, should be a lien upon his land.

That in addition to the above agreement, the plaintiff required each member of the said association and applicant for water, before he could obtain the water for which he had signed and agreed to pay, to sign an additional agreement, wherein and whereby he bound himself, his heirs, administrators and assigns, to pay Ninety-three Dollars (\$93.00) per acre for each acre of the total number of acres of irrigable land owned by him under said project, in not more than ten (10) annual installments, and in which he agreed that each and all of said installments should thereby become a lien against all the land signed for. Said lien attaching immediately upon the execution of said agreement and being enforceable as to each and every installment. Said agreement further provided—"that such lien or liens shall have the full force and effect of a mortgage or deed of trust and vest in the United States all the rights and powers of which might be exercised and all benefits which might be claimed by the mortgage in a real estate mortgage given to secure the payment of a loan or

debt, including the right of foreclosure by or on behalf of the United States in any court of competent jurisdiction and the applicant grants to the United States or its transferee all the rights, powers, and authority in and over the above described premises which might be exercised by the trustee named in a deed of trust given to secure the payment of a loan or debt.

"The applicant further agrees and binds himself, his heirs, administrators and assigns, to pay all taxes and other liens and encumbrances which are now or may hereafter (during the life of the lien herein given to the United States) become a superior lien or encumbrance to that of the United States, and of the applicant, his administrators, executors, heirs, or assigns fail to pay such tax, lien, or encumbrance when due, the United States may pay the same and add the amount thereof to the lien held by the United States under this agreement and recover the same.

"It is further agreed that upon failure of the applicant to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

"This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above described land for the payment of the building and operation and

maintenance charges, may be enforced, at the option of the United States, either directly by the United States or through the medium of the water users' association."

5.

That after said association was formed and the agreement entered into between it and the plaintiff, as herein-before set forth, the plaintiff entered upon the construction of said irrigation works, and in connection therewith made the contract with the defendant, Theodore Weisberger, set forth in the complaint herein. That said project has been practically completed and the total cost thereof ascertained by the officers and employees of the plaintiff and the total cost thereof has been apportioned to and charged up against the said Tieton Water Users' Association, and its shareholders and their lands, by the Secretary of the Interior. That there was included in said ascertained cost, all moneys expended in the construction of said irrigation works, including the moneys which plaintiff claims to have expended as set forth in its complaint herein, and there has been charged against the shareholders of said Tieton Water Users' Association and their lands, the said sum of Fifty-one Thousand, Ninety-five and five one-hundredths Dollars (\$51,095.05), which plaintiff is now seeking to recover from these defendants. That the amount to be charged for each acre-water-right was fixed by the officers and agents of the plaintiff having charge of said project at Ninety-three Dollars (\$93.00) per acre, which amount was arrived at by

dividing the total ascertained cost of constructing said irrigation works in which was included the said sum of \$51,095.05 by the total number of acres of land to be irrigated therefrom. That the plaintiff has charged to the shareholders of said association, the total cost of said project, and has already collected from a large number of land owners part of the amount so charged, and has already received from said water users a part of the moneys for which it is suing the defendants herein, the exact amount thereof being unknown to these defendants. That as hereinbefore set forth, the payment of the balance of said moneys has been guaranteed by said Tieton Water Users' Association and is now a lien upon the lands of the members of said association and upon the water rights appurtenant thereto and the said guarantee and lien is held by the plaintiff as security for the payment of the balance of the moneys which it expended in the construction of said project including the moneys which it is seeking to recover from the defendants in this action.

6.

That as shown by the facts above set forth the plaintiff has no such interest in the subject matter of the cause of action set forth in its complaint herein as entitles it to maintain this action, and has no right of recovery against these defendants, and said complaint should be dismissed.

FOR A SECOND AFFIRMATIVE DEFENSE
TO THE CAUSE OF ACTION SET FORTH IN

PLAINTIFF'S AMENDED COMPLAINT HERE-
IN, DEFENDANT ALLEGES:

I.

That the plaintiff and the defendant, Theodore Weisberger, entered into a contract as alleged in plaintiff's complaint herein, a copy of which has been furnished to the defendants by the plaintiff and is hereby referred to for a full and detailed statement of the terms and conditions of said contract.

2.

That the specifications accompanying said contract and made a part thereof provided that the right-of-way for the works to be constructed and for all necessary borrow pits, channels, spoil banks, ditches, roads, etc., should be provided by the United States and further provided that before the defendant, Theodore Weisberger, should be required to begin the construction under said contract, the United States would build a wagon road in the Tieton Canyon to the diverting dam as shown in the drawings for said work which were a part of the contract, and would also make suitable improvements on the existing road.

3.

That said specifications further provided that should the contractor, by reasons of conditions developing during the progress of the work, find it impracticable to comply strictly with the specifications and should apply in writing for a modification of structural requirements or methods of work, such changes might be authorized by the engineer, provided it be not

detrimental to the work and be without additional cost to the United States.

4.

Said specifications further provided that the engineer in charge might order the contractor to suspend any work which might be damaged by inclemency of the weather or other climatic conditions and that due allowance would be made to the contractor for the time actually lost by him on account of such suspension.

5.

That to perform said contract, it was necessary for the defendant, Theodore Weisberger, to procure and assemble at the place where the concrete shapes were to be made in the Tieton Canyon, a large amount of machinery, material, equipment, tools, and supplies, much of which could only be procured in the Eastern States and much of which was of special design and had to be manufactured especially for the work in hand. That immediately after the execution of said contract, the defendant, Theodore Weisberger, with due diligence began to purchase and assemble at Natches City, Washington, (that being the nearest railroad station to said work) material, supplies, machinery, tools and equipment for the performance of said work and proceeded with all diligence practicable, to carry out and perform the terms and conditions of said contract on his part.

6.

That the plaintiff failed to perform the contract on its part, in that it failed to construct the wagon road in the Tieton Canyon, as agreed upon, and

failed to make the necessary improvements in the existing road as therein provided, and did not construct or repair said roads prior to the time when it became necessary for the defendant to commence work and to commence to move his material and supplies to the point of use, and said plaintiff never completed the construction of the road to the diverting dam at any time prior to February 1st, 1908.

That at various and frequent times during the spring, summer and winter of 1907, the plaintiff closed, obstructed and made impassable the roadway which existed, by the careless and negligent use of dangerous explosives and by obstructing said road with debris thrown from the canal excavation, thus hindering and delaying the defendant in the movement of his supplies and material and in the performance of his contract.

That the defendant was also hindered in the performance of the work under said contract by the action of the employees of the plaintiff in imposing upon the defendant unnecessary requirements and restrictions in the construction of the concrete shapes and the methods and manner of performing the work under said contract. That plaintiff did not have the canal constructed in which the concrete shapes were to be placed by the time defendant was ready to commence placing the same.

7.

That notwithstanding said default on the part of the plaintiff, the defendant used every endeavor and due diligence to get his tools, materials, machinery

and supplies on the ground and prosecuted said work as diligently as possible under the existing conditions except when prevented therefrom by the plaintiff. That defendant continued to prosecute said work and fulfill his contract up to the 4th day of November, 1907, on which date the engineer of the plaintiff in charge of said work ordered the defendant to cease work and to cease manufacturing concrete shapes, for the reason that the weather was so cold and inclement that the work could not be satisfactorily done, and said shapes could not be safely manufactured. That about the time of such suspension snow fell to a depth of several feet in the Tieton Canyon where said work was being carried on and the weather became so cold and inclement that it was impossible to prosecute said work or to construct the concrete shapes as provided in the contract. That said conditions continued until about the 5th day of May, 1908, during all of which time it was impracticable and impossible to proceed with said work and the performance of said contract on the part of the defendant.

8.

That the method of constructing the portion of the canal embodied in schedules 6A and 7A was new and untried and neither the engineers of the plaintiff nor the defendant had had any experience in constructing concrete shapes of the character called for in the specifications or lining a canal therewith. That after the defendant, Theodore Weisberger, commenced the performance of said contract and during

the progress of the work thereunder, it developed that under the conditions existing it was impracticable and impossible to comply with the specifications of the Government regarding said work and that if the concrete shapes were constructed and put in place as provided in said specifications, a good, safe or practicable canal could not be constructed therewith. That shortly after said work was suspended, as aforesaid, and on the 22nd day of November, 1907, the defendant, Theodore Weisberger, applied to the proper officials of the plaintiff for a change in the structural requirements and methods of performing said work.

9.

That while said application was pending and before it had been passed upon by the engineers of the plaintiff, and while the weather was and had been so cold and inclement that it was impracticable and impossible to proceed with said work, on or about the 1st day of February, 1908, the employees of plaintiff in charge of said work, without just cause or reason therefor and without any fault or default on the part of said defendant, Theodore Weisberger, notified him that said contract was permanently suspended and that he would not be permitted to proceed further with said work and that the plaintiff would proceed to complete the same and charge the expense thereof to the defendant. That without allowing defendant any extension of time for or on account of the suspension of work in the Fall, or on account of delays caused by plaintiff, and without giving the defendant an opportunity to go on with said work,

or complete said contract, and immediately after the 1st day of February, 1908, the officers and employees of the plaintiff in the absence of the defendants, wrongfully and without just cause or excuse therefor, and without the acquiescence or consent of the defendants and against the wishes of the defendants, forcibly entered upon said work, took possession thereof and excluded the defendants therefrom and took possession of all tools, implements, machinery, equipment and supplies belonging to the defendant, Theodore Weisberger, and used by him in said work and ever thereafter wrongfully and forcibly prevented the said defendant from prosecuting or completing said work, or any part thereof.

10.

That before the work was stopped in the Fall of 1907, as hereinbefore alleged, and on the 23rd day of October, 1907, the Secretary of the Interior, granted to the defendant Weisberger, an extension of time for the performance of his contract, giving him until October 1st, 1908, to complete schedule 6A and until October 15, 1908, to complete schedule 7A. That at the time plaintiff and its employees took possession of said work and the property of the defendant and excluded him therefrom, there was sufficient time left in which defendant could have completed his contract before the extension thereof above mentioned could have expired; and had he not been prevented therefrom by the acts of the officers and employees of plaintiff, he could have completed his part of the contract within the time to which he was entitled

for the completion thereof and in any event could have had the concrete shapes manufactured and ready to place before plaintiff had the canal ready to receive them.

11.

That the acts of the Secretary of the Interior and of his representatives in connection with the suspension of the contract sued on herein and taking possession of the work and property of the defendants as hereinbefore alleged, were committed by said Secretary and his representatives without a full or adequate knowledge of the subject matter thereof, and said acts were arbitrary, erroneous, unjust, not based upon the honest judgment of the said Secretary of the Interior and his representatives, properly exercised, and were fraudulent as against these defendants; that the action of said Secretary of the Interior in approving the recommendation of the Acting Director that said contract be suspended, was taken under such a gross misapprehension and mistake regarding the time of the commencement of work by the defendant under said contract, the progress made in said work, the instructions of the engineers to commence laying shapes and the compliance or non-compliance of the defendant therewith, the number of forms on hand, the attitude of the defendant in regard to the suspension of said contract and as to the time which he had for the completion of the work and the facts generally relating to the construction of the canal and what the defendant Weisberger had done and was doing under the contract,

that the Secretary of the Interior failed to exercise an honest and unbiased judgment in the premises.

That the alleged auditing and approval of the account of the United States against the defendant Weisberger, for excess cost, was made by the Chief Engineer of the plaintiff without knowledge of the correctness of said account or of the subject matter thereof, and said alleged auditing and approval was a gross mistake on the part of said Engineer and was arbitrary, unjust, unfair and fraudulent as against this defendant, and said audited account as audited by said engineer is incorrect.

FOR A THIRD AFFIRMATIVE DEFENSE TO THE CAUSE OF ACTION SET FORTH IN PLAINTIFF'S AMENDED COMPLAINT HEREIN, DEFENDANT ALLEGES:

I.

That to enable the defendant, Theodore Weisberger, to perform said contract and to construct the concrete shapes, flumes and supports, as therein provided, and in accordance with the plans and specifications there must have been available along the line of the canal, where said work was to be performed, large areas of level ground clear of brush, timber and stone, on which the defendant could set up his plants and machinery for manufacturing said concrete shapes, flumes and supports and on which the same could be manufactured and left to harden until fit for use. The sites for the said manufacturing plants and ground on which to manufacture and harden said concrete

shapes, flumes and supports were, by the terms of said contract, to be furnished by the plaintiff.

At the time the contract set forth in plaintiff's complaint and referred to in the preceding affirmative defense was entered into, the engineers and employees of the plaintiff, having said matter in charge, and these defendants believed that there were several places along the proposed route of said canal where there were large areas of smooth ground suitable for the establishment of manufacturing plants and on which the concrete shapes, flumes and supports could be manufactured and prepared for use, and that there was sufficient and suitable ground available to enable the defendant to prosecute the work of constructing and hardening said concrete shapes continuously and without interruption. That as shown by the drawings and maps attached to said contract, there were four places designated thereon where said plants should be established and said concrete shapes, flumes and supports manufactured and hardened and which the engineers and officers, representing the plaintiff, and these defendants, at the time said contract was entered into, believed to exist and to be amply sufficient for carrying on said work in accordance with the terms of said contract. That defendant, Theodore Weisberger, examined said sites before submitting his bid on said contract.

2.

That as a matter of fact, the officers, engineers and agents of the plaintiff and these defendants were mutually mistaken in this respect and at the time said con-

tract was entered into there was not available any considerable or sufficient area of smooth and suitable ground upon which the defendants could establish their plants and manufacture the concrete shapes, flumes and supports and harden the same, nor were the sites shown on said maps and plats in existence, the same having been destroyed by floods between the time when said maps were made and said sites examined by said defendant, and the date when said contract was entered into. Without such ground available it was impracticable and impossible to fulfill the terms and conditions of the contract.

3.

At the time of entering into said contract, the engineers, officers and agents of the plaintiff and these defendants believed that the concrete shapes could be manufactured and jointed in the method provided in the contract and specifications so as to make a water tight, smooth, continuous concrete canal and to make such a canal as the contract and specifications called for. That the method of canal construction had never theretofore been tried out and as a matter of fact, both parties were mistaken in regard thereto and it was impossible, under the methods provided in the contract, to construct and joint the concrete shapes so as to make a canal of the character called for in the contract and specifications.

4.

That by reason of the mutual mistake of the parties in the respect above mentioned, it was impracticable and impossible for the defendant to carry out and perform

the contract in accordance with its terms and provisions and it was to enable the defendant to overcome this and enable him to perform the contract in accordance with its terms that application has been made by the defendant for changes in the contract, which application was pending at the time further work on the contract by the defendant was prevented by the action of the plaintiff's employees.

FOR A FOURTH AFFIRMATIVE DEFENSE AND AS A COUNTERCLAIM AGAINST THE PLAINTIFF, AND OFF-SET TO ITS CLAIM SET FORTH IN THE AMENDED COMPLAINT HEREIN, DEFENDANTS ALLEGE:

1.

Defendants hereby expressly refer to and adopt as a part of this defense and counter-claim, all the allegations contained in the second affirmative defense herein-above set forth.

2.

That these defendant, long prior to the first day of February, 1908, had provided and installed at the site at which the work provided for in the contract was being carried on and had on hand to be used and which were at said time being used in and about the performance of said work, a large amount of tools, implements, machinery, equipment, supplies, etc., as fully set forth and described in a certain written instrument and receipt bearing the date the 12th day of February, 1908, signed by Charles Sweigart, Project Engineer, then in charge of said Tieton Project, and said work, a copy of which instrument and receipt is now in

possession of the plaintiff and to which reference is hereby made for a more complete description of said tools, implements, machinery, equipment and supplies, that said tools, implements, machinery, equipment, supplies, etc., were, on said date, at the place where the same then were, and for the purpose for which they were being used and were subsequently used by the plaintiff, of the aggregate value of Sixty-nine Thousand, Seven Hundred Seventy-six and 14-100 Dollars (\$69,776.14).

3.

That on or about the first day of February, A. D. 1908, said plaintiff by its engineers, servants and agents, duly authorized and empowered thereto, took possession of all and singular the said tools, implements, machinery, equipment, supplies, etc., and converted the same and the whole thereof to the plaintiff's own use, and plaintiff still retains the same, by reason whereof the plaintiff became and is indebted to these defendants in the sum of Sixty-nine Thousand, Seven Hundred Seventy-six and 14-100 Dollars (\$69,776.14), with interest thereon at the rate of six per cent. per annum from February 1st, 1908.

4.

That prior to the commencement of this action, these defendants demanded the return of said property, which was refused, and prior to the filing of this answer defendants presented to the accounting officers of the Treasury Department of the United States for their examination, their claim as above set forth for said amount of \$69,776.14, which claim was disallowed by said accounting officers.

FOR A FIFTH AFFIRMATIVE DEFENSE AND AS A COUNTER-CLAIM AGAINST THE PLAINTIFF AND OFFSET TO ITS CLAIM SET FORTH IN THE AMENDED COMPLAINT HEREIN, DEFENDANTS ALLEGE:

1.

These defendants hereby expressly refer to and adopt as a part of this defense and counter-claim, all allegations contained in the second affirmative defense in this answer set forth.

2.

That after the execution of the said contract, the defendant, Theodore Weisberger, entered upon the performance of said work as specified in said contract and diligently prosecuted the same until said work was suspended by the plaintiff as aforesaid. That prior to the first day of February, 1908, he had performed labor and services and furnished material in and about said work and in the manufacture of concrete shapes as called for in said contract, which labor and service so performed and material furnished were of the reasonable value of Twenty-nine Thousand Six Hundred Ninety-seven and 42-100 (\$29,697.42) Dollars, no part of which has been paid except the sum of Eighteen Thousand Five Hundred Sixty-nine and 28-100 (\$18,569.28) Dollars, leaving a balance of Eleven Thousand One Hundred Twenty-eight and 14-100 (\$11,128.14) Dollars due and owing to the defendants from the plaintiff which sum the plaintiff has heretofore failed and refused and still fails and refuses to pay, though often demanded so to do.

3.

That prior to the filing of this answer herein these defendants presented to the accounting officers of the Treasury Department of the United States for their examination, their claim as above set forth for said amount of \$11,128.14, which claim was disallowed by said accounting officers.

FOR A SIXTH AFFIRMATIVE DEFENSE AND AS A COUNTER-CLAIM AGAINST THE PLAINTIFF AND OFF-SET TO ITS CLAIM SET FORTH IN THE AMENDED COMPLAINT HEREIN, DEFENDANTS ALLEGE:

1.

That on or about the 1st day of February, 1908, these defendants were the owners and in possession and entitled to the possession of a certain warehouse building located in Natches City, Yakima County, State of Washington, and of a railroad siding leading to said warehouse, which warehouse was at said time, being used by defendants for the storing of supplies in connection with the performance of the contract hereinbefore mentioned.

2.

That on or about the 1st day of February, 1908, the plaintiff by its engineers, servants and agents duly authorized and empowered thereto, took possession of said warehouse and railroad side track, excluded defendants therefrom and plaintiff has ever since retained said warehouse and siding in its possession and has used the same in connection with the construction of said Tieton Irrigation Works.

3.

That the reasonable rental value of said warehouse is and has been, during said time, the sum of One Hundred Dollars (\$100.00) per month and plaintiff had used and occupied said warehouse for a period of thirty-seven (37) months prior to the commencement of this action, and by reason thereof, is indebted to these defendants in the sum of Thirty Seven Hundred Dollars (\$3,700.00) with interest.

4.

That prior to the filing of this answer, these defendants presented to the accounting officers of the Treasury Department of the United States, for their examination, their claim as above set forth for said sum of \$3700.00, which claim was disallowed by said officers.

WHEREFORE, defendants having fully answered plaintiff's amended complaint herein, demand judgment:

1. That plaintiff's action be dismissed.

2. That if the action is not dismissed, it be adjudged that there is due and owing from the plaintiff to the defendants, Weisberger, the several sums above set forth, to-wit: the sum of Sixty-nine Thousand Seven Hundred Seventy-six and 14-100 Dollars (\$69,776.14), with interest at six per cent per annum from February 1st, 1908, the sum of Eleven Thousand One Hundred Twenty-eight and 14-100 Dollars (\$11,128.14), with interest at six per cent per annum from February 1, 1908, and the sum of Thirty-seven Hundred Dollars (\$3700.00) with interest thereon at

six per cent. per annum from the first day of March, 1911.

The said sums to be off-set against any claim of the plaintiff for their costs and disbursements incurred in this action.

(Signed) PARKER & RICHARDS,
Attorneys for Theodore Weisberger and
Maude Weisberger.

STATE OF WASHINGTON,
County of Yakima,

ss

THEODORE WEISBERGER, being first duly sworn, deposes and says that he is one of the defendants above named, that he has read the foregoing amended and supplemental answer, knows the contents thereof, and the same is true as he verily believes.

(Signed) THEODORE WEISBERGER.

Subscribed and sworn to before me this 19th day of February, 1912. (Signed) FRED PARKER,
Notary Public for Washington, residing at North Yakima.

(Notarial Seal.)

Endorsements:

Service of the foregoing answer accepted and copy received, this 19th day of February, 1912.

(Signed) OSCAR CAIN and
RALPH B. WILLIAMSON,
Attorneys for Plaintiff.

Answer to Amended Complaint.

Filed February 19, 1912.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 73.

UNITED STATES,

Plaintiff,

vs.

THEODORE WEISBERGER, et al.,

Defendants.

ANSWER OF EMPIRE STATE SURETY COM-
PANY TO AMENDED COMPLAINT.

Comes now the Defendant, The Empire State Surety Company, and for its answer to the amended complaint herein states:

I.

That for answer to the first, second, third and fifth paragraphs thereof, it admits the same.

II.

That for answer to the fourth paragraph thereof, it admits that under and by virtue of the Act of Congress approved June 17th, 1902, the plaintiff and the defendant Theodore Weisberger, on or about the 5th day of January, 1907, entered into a contract whereby the defendant Theodore Weisberger agreed to supply material, excepting cement and reenforcing steel, and to manufacture reenforced concrete shapes of various sizes and designs, as specified in said contract, to form a lining of a certain portion of the open canal, cuts and tunnels, and to construct certain elevated flumes in the canal, known as the Tieton canal, described in said contract, as in the contract particularly specified and described, and that said contract further provided that

the said Weisberger should load, handle and transport the said concrete shapes so manufactured to the place of intended use, and place the same in portions of said canal and tunnels, and construct the supports for certain flumes, in accordance with the plans and specifications prepared therefor by the plaintiff's engineers; but denies each and every of the other allegations in said paragraph contained.

III.

That for answer to the sixth paragraph thereof it admits that the defendant Theodore Weisberger after the execution of the contract, entered upon the performance of said work so agreed to be performed by him, as in said contract stated, but denies each and every of the other allegations in said paragraph contained.

Amend paragraph III. of answer of Empire State Surety Co., to amended complaint, by adding to said paragraph III. the following:

"Further answering said paragraph 6, this defendant alleges that all and singular the acts of the Secretary of the Interior and of his representatives committed as set forth in said paragraph 6, were so committed by said Secretary of the Interior and his representatives without a full or adequate knowledge of the subject matter thereof; that all and singular the acts of said Secretary of the Interior and of his representatives committed as set forth in said paragraph 6, were erroneous, unjust, not based upon the honest judgment of said Secretary of the Interior and his representatives properly exercised and were fraudulent as against

this defendant," that all and singular the acts of said Secretary of the Interior and all and singular the acts of the Engineer in charge of said work committed as alleged in said paragraph 6, were so committed by said Secretary of the Interior and by said Engineer in charge of said work, under a gross misapprehension and mistake regarding the time of commencement of said work by the defendant Weisberger under said contract, the progress made in said work, the instructions of plaintiff's representatives upon said work as to the laying of shapes, the number of forms on hand and the attitude of the defendant Weisberger in regard to continuing work under said contract and in regard to suspension of said contract.

IV.

That it denies each and every allegation in the seventh paragraph contained, and specially denies that the said plaintiff expended the sum of Fifty-one Thousand Ninety-five and five one hundredths dollars, or any other sum whatsoever, for the completion of said work, in excess of the amount for which the defendant agreed to perform the same; denies that after the completion of the work contemplated by the contract referred to in paragraph seven of plaintiff's amended complaint, or at any time or at all, an accounting to determine the cost of the construction of said work was made in pursuance of the terms of said contract, or of any contract; further answering said paragraph seven, this defendant alleges that the pretended accounting therein referred to and alleged, was and is arbitrary, unwarranted, incorrect, unjust and not based upon actual ex-

penditures made by the plaintiff for or on account of the contract set up in said complaint or any contract; that any work done by the plaintiff upon the Tieton Reclamation Project referred to in plaintiff's amended complaint and for which said pretended accounting was made, was other and different work than that specified in the contract set out in plaintiff's said amended complaint, and was not done in pursuance of said contract nor in accordance therewith, and was not done in accordance with or in pursuance of the plans and specifications attached to and made a part of said contract.

Amend paragraph IV. of answer of Empire State Surety Co. to amended complaint, by adding to said paragraph IV., the following:

"That said alleged auditing and approval of said account was made by the Chief Engineer of the plaintiff, without the full or adequate knowledge of the correctness of said account, or the subject matter thereof, and was and is erroneous, unjust, unfair and fraudulent as against this defendant."

V.

That for answer to the eighth paragraph, it admits that on or about the 5th day of January, 1908, the defendant Weisberger, as principal and the answering defendant as surety, did make, execute and deliver unto the plaintiff their bond in the sum of forty-five thousand dollars (\$45,000.00), wherein and whereby the answering defendant did promise and agree that the defendant Weisberger should accomplish said contract; but denies each and every of the other allegations therein contained.

Further answering the amended complaint of the plaintiff and as a first affirmative defense thereto, this defendant alleges :

VI.

That after the said Weisberger as contractor entered upon the performance of said work, and without the knowledge of this answering defendant, and without obtaining its consent thereto or therefor, the said plaintiff, under agreement with the said defendant Weisberger changed, altered, and amended said contract, and the plans and the manner of performing the same, wherein and whereby the work was to be done in a different and more expensive manner than that contemplated or provided in the contract as executed, for which the bond was given, and in a way and manner that if carried out was and would be and is greatly to the damage, detriment and loss of this defendant, and in violation of its rights and which greatly prejudiced its rights, and which violated the terms and conditions of its said bond, and which was contrary to the law governing the same, and all of which was done without the knowledge or consent of this answering defendant, when the said plaintiff might, could and ought to have, and had opportunity to give this answering defendant notice thereof, but neglected and refused to give it any notice of such changes, and of such conduct, and purposely, and contrary to the rights of the answering defendant, withheld any notice of such changes and deviations from it, to its great damage.

VII.

That by reason of the acts of changing, altering and

amending the contract, and the manner of doing the work, and by reason of the acts of the Secretary of the Interior and of the Engineer in charge of said work, as above set forth, the said answering defendant was and is discharged of and from all liability, demands, and claims upon it under said bond or indemnity agreement, for and on behalf or for the benefit of the said plaintiff.

For a further answer to the amended complaint herein, and by way of a second affirmative defense thereto, this defendant alleges:

VIII.

That under and by virtue of said contract, and by the terms thereof, and by understanding and agreements made between the plaintiff and the defendant Weisberger, after said contract was made, the plaintiff promised and agreed to build and construct certain wagon roads in a good and substantial manner, for use of the defendant Weisberger in carrying on the work, and agreed to perform certain other work and furnish materials, all of which it refused and neglected and declined to do, although bound thereunto to perform and do, and breached the contract in this respect, and in this regard, without giving any notice to the said answering defendant at any time, nor did it nor the said defendant Weisberger, or any person whomsoever, give the said defendant any notice thereof, nor did it have any knowledge of such acts of omission and commission pleaded as aforesaid until about the time that this action was brought, and long after the omissions

and acts were committed, and all of which was greatly to the damage of the said answering defendant.

IX.

That by reason of the acts of omission and commission committed by the plaintiff, and its failure to notify the defendant as aforesaid, this answering defendant was and is discharged of and from all liability, demands, and claims upon it under said bond or indemnity agreement for and on behalf, or for the benefit of the said plaintiff.

Further answering the amended complaint herein and for a third affirmative defense thereto, this defendant alleges:

X.

That after the defendant Weisberger entered upon the performance of his agreement made as aforesaid, the said plaintiff declared by written notice, the said Weisberger to be in default, but without then or at any time whatsoever giving any information or notice thereof to this answering defendant, and without giving the said answering defendant the right or privilege to enter upon said work, and perform the same, as was its right under law and the contract, and to be subrogated to the rights of the defendant Weisberger, all of which was to the great damage and injury of the said answering defendant, and contrary to and in violation of its rights as a surety, and because thereof this answering defendant has been greatly damaged, in that it has had to prepare for a defense herein, to employ attorneys and agents in preparing its defense, when it has had no knowledge of the acts complained of, and no opportunity

to make the default good if one was in truth existing, and without being given any notice of the alleged default, or any opportunity to make itself whole and sustain itself under the contract and bond, and the law governing the same.

XI.

That by reason of the said conduct of the plaintiff, in the preceding paragraph set forth, this answering defendant was and is discharged of and from all liability, demands, claims and obligations upon it under said bond or indemnity agreement, for and on behalf, or for the benefit of the said plaintiff.

Further answering the amended complaint herein, and for a fourth affirmative defense thereto, this defendant alleges:

XII.

That during the time said work was being transacted by the plaintiff, the engineers, servants and agents in charge thereof were compelled to and did make divers and sundry changes of a radical nature in the plans and specifications of said work, and in the manner of performing the same, such changes being rendered necessary because it was discovered that as said work progressed the plans and specifications and method of performing the said work were not feasible, were impracticable and impossible, and that by reason of said changes the cost thereof was greatly enlarged and increased, and no notice, or any notice at all of said changes and of such increased obligations was then or ever given to the said answering defendant, nor did it then or ever, discover the same or any thereof, until

about the time of the bringing of this suit, and the changes, modifications and increased responsibility referred to aforesaid in particular are described as follows:

(a) Upon making practical tests, it was found that the shapes or sections as designed originally and at the time the answering defendant became surety herein, were too weak and too small in size to stand in all respects the load or strain required, and thereupon a modified plan was promulgated and put in force, greatly increasing the cost of said shapes, and all of which was to the benefit of the plaintiff, and yet no allowance was made for such increased cost or for such change.

(b) The manner of tunnel construction was changed in several respects by which the cost was greatly increased, and particularly as follows:

The specifications in force at the time the answering defendant became surety provided that in the construction work, boring the tunnel, lining and back-filling should be carried on close together, so that the material for back-filling should not be removed from the tunnel, and then hauled back again, but this should be avoided, and the back-filling material used when taken from the tunnel borings, but the same could not be done according to the plans that were enforced by the plaintiff, and therefore it was necessary to take all of the material to be used for back-filling out on the dump beyond the tunnels and then haul it back, greatly increasing the cost, because the plans were impractical, and could not be carried out, and for which no allowance was ever

made to the contractor, because of such impractical plans and specifications.

(c) The plans and specifications in force at the time the answering defendant became surety provided that the shapes should be set in longitudinal sections, one-eighth of an inch apart, and the intersection thus left caulked with oakum, but when the shapes were put in position, and contrary to the warrant and expectation of the engineers of plaintiff who had sole charge of the work, it was found that the deflexion of bending of the shapes was such that a very uneven and rough surface of the bottom and sides, particularly of the bottom, of the canal would be left, greatly impeding the water-flow, and making the work impracticable, and causing a condition which would prevent the flowage of the amount of water through the canal which was guaranteed by the plaintiff, and thereupon sundry changes were made without notice to the answering defendant, whereby the cost was greatly increased, in this, that the shapes were set farther apart, and wooden wedges placed between them, and then the interstices thus left filled with a character of cement of a different structure and constituency, different from that in the shapes, requiring thus two kinds of cement mortar, and creating additional and increased labor and expense, because of the change of work, and no allowance was made for this change, a general detail of which is immediately set forth above.

(d) When it came to the construction of Trail Creek Tunnel, being a distance of about three thousand feet, the plaintiff without notice to the answering de-

fendant, changed the manner of the construction thereof, in that it did not use the concrete shapes, but in lieu thereof made a monolithic lining construction, to the detriment and damage of the answering defendant, in this, that the defendant Weisberger as contractor petitioned for the change of construction in this tunnel and was refused the right to make the change, and was one of the reasons by which he could not perform the work because it was impossible and impracticable to perform it otherwise.

(e) When this answering defendant became surety as aforesaid, by the plans and specifications certain places were designated where the contractor should make the canal and tunnel shapes, but because of great floods on the Tieton River, the places were so washed, destroyed or damaged that it was impossible to do the manufacturing work at said points, and thereupon and all without notice to this answering defendant, the contractor applied for the privilege of using other places upon which to construct his shapes, which right was denied by the engineers of plaintiff at all times in charge of said work, all to the great detriment of the answering defendant, and thereafter in constructing the work plaintiff did use the places for manufacturing the shapes which the contractor requested the privilege of using and which was denied, and all of which the answering defendant did not discover until shortly before the bringing of this suit.

That by virtue of the matters set forth in the immediately preceding paragraphs, the liability of the answering defendant herein and under its bond is ended and

terminated, and because thereof it was and is discharged of and from all obligation under said bond and contract.

WHEREFORE, the said answering defendant prays that it may be dismissed hence with its proper costs to be recovered against the said plaintiff.

(Signed) JOHN P. HARTMAN,

(Signed) McAULAY & MEIGS,

Attorneys for Defendant Empire State Surety Company.

Endorsements:

Service of the within answer admitted, and verification thereof waived, this 19th day of February, 1912; receipt of a true copy of said answer acknowledged this 19th day of February, 1912.

(Signed) OSCAR CAIN,

United States Attorney and Attorney for Plaintiff.

Answer of defendant Empire State Surety Company to Amended Complaint.

Filed February 19, 1912.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER, and EMPIRE STATE SURETY
COMPANY, a Corporation,

REPLY.

Comes now the above named plaintiff, the United States of America, and replying to the several affirmative defenses set forth in the answer of the defendant, Empire State Surety Company, herein, denies each and every allegation of the affirmative matter therein contained.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) RALPH B. WILLIAMSON,

Special Assistant to the United States Attorney.

Endorsements:

Due and legal service of the within reply is hereby admitted this 20th day of February, 1912.

(Signed) McAULEY & MEIGS,

Attorneys for Defendant, Empire State Surety Com-
pany.

Reply.

Filed February 20, 1912.

W. H. HARE, Clerk.

*In the District Court of the United States for the
Eastern District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER, and EMPIRE STATE SURETY
COMPANY, a Corporation,

Defendants.

REPLY.

Comes now the plaintiff, the United States of Amer-
ica, and replying to the several affirmative defenses set
forth in the answer of the defendants, Theodore Weis-
berger and Jane Doe Weisberger, herein, denies each
and every allegation of the affirmative matter therein
contained.

(Signed) OSCAR CAIN,

United States Attorney,

(Signed) RALPH B. WILLIAMSON,

Special Assistant United States Attorney.

Endorsements:

Due and legal service of the within reply is hereby
admitted this 20th day of February, 1912.

(Signed) PARKER & RICHARDS,

Attorneys for Defendants Weisberger.

Reply.

Filed November 20, 1912.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, et al.,

Defendants.

VERDICT.

We, the jury in the above entitled cause, find for the
Defendants.

(Signed) R. D. SUNDERLAND,

Endorsements:

Foreman.

Verdict.

Filed February 23, 1912.

W. H. HARE, Clerk.

By E. E. Cleaver, Deputy.

*In the District Court of the United States, Eastern Dis-
trict of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER, his wife, and EMPIRE STATE
SURETY COMPANY, a Corporation,

Defendants.

MOTION.

Comes now the above named plaintiff, United States
of America, by Oscar Cain, Esquire, United States At-

torney for the Eastern District of Washington, and Ralph B. Williamson, Special Assistant to the United States Attorney for said District, and respectfully moves the Court for judgment according to the prayer of its complaint, notwithstanding the verdict of the jury in said case.

This motion is based upon the record in said case.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) RALPH V. WILLIAMSON,

Special Assistant to the United States Attorney.

Endorsements: Due and legal service of the within motion is hereby accepted this 29th day of February, 1912, and receipt of a copy of the within motion hereby acknowledged.

(Signed) PARKER & RICHARDS,

Attorneys for Defendants Theodore Weisberger
and Jane Doe Weisberger.

(Signed) McAULEY & MEIGS,

Attorneys for Defendant, Empire State Surety
Company.

Motion for Judgment notwithstanding the verdict.
Filed February 29, 1912. W. H. Hare, Clerk. By E.
E. Cleaver, Deputy.

In the District Court of the United States, Eastern District of Washington, Southern Division.

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, MAUDE WEISBERGER, his wife, and EMPIRE STATE SURETY COMPANY,

Defendants.

OPINION.

Ralph B. Williamson, Special Assistant to the United States Attorney.

Oscar Cain, United States Attorney.

E. C. Macdonald, Assistant United States Attorney.

Parker & Richards, for the defendants Weisberger and wife.

John P. Hartman and McAuley & Meigs, for the defendant Empire State Surety Company.

RUDKIN, District Judge. On the 5th day of January, 1907, the defendant Theodore Weisberger, entered into a contract with the United States for the construction of those portions of the Tieton Canal in Yakima County which are designated on the specifications as "Schedule 6A" and "Schedule 7A." The work embraced in these two schedules consisted largely of manufacturing concrete shapes for canal and tunnel lining and for flumes, and placing them in the canal. Under the original contract the entire work was to be completed by March 31, 1908, but the time for completing the work specified on Schedule 6A was later extended

to August 1, 1908, and the work covered by Schedule 7A until October 15, 1908. The specifications contain the following provisions, among others:

22. "Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or if at any time the contractor is not properly carrying out the provisions of his contract in their true intent and meaning, notice thereof in writing will be served upon him and should he neglect or refuse to provide means for a satisfactory compliance with the contract within the time specified in such notice, the Secretary of the Interior in any such case shall have the power to suspend the operation of the contract. Upon such suspension the Secretary of the Interior may take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under the contract and may appropriate all materials and supplies of any kind, shipped or delivered, by or on account of the contractor for use in connection with the work, and he may use the same for the completion of the work either directly by the United States or by other parties for it; or the Secretary of the Interior may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, supplies and animals at the contractor's expense as may be necessary

for the proper conduct of the work and for the completion thereof. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. In the determination of the question whether there has been such non-compliance with the contract as to warrant the suspension thereof, the decision of the Secretary of the Interior shall be binding on both parties."

25. "The Secretary of the Interior reserves the right to make such changes in the quantities of work or material as may be deemed advisable, without notice to the surety or sureties on the bond given to secure compliance with the contract, by adding thereto or deducting therefrom, at the unit price of the contract. These changes will include modifications of shapes and dimensions of canals, dams and structures of whatsoever nature, particularly foundation work, to suit conditions disclosed as the work progresses. Should any change be made in a particular piece of work after it has been commenced, so that the contractor is put to extra expense, the engineer will make reasonable allowance therefor, which action shall be binding on both parties. Extra work or material will be paid for as hereinafter provided."

27. "Should the contractor by reason of conditions developing during the progress of the work find it impracticable to comply strictly with the specifications, and apply in writing for a modification of structural requirements or methods of work, such change may be authorized by the engineer provided it be not detrimen-

tal to the work and be without additional cost to the United States.”

8. “The word ‘engineer’ used in these specifications or in the contract, unless qualified by the context, means the Chief Engineer of the Reclamation Service. He will be represented on the work by assistants and inspectors with authority to act for him and direct the work. Upon all questions concerning the execution of the work, the classification of the material in accordance with the specifications, and the determination of costs, the decision of the Chief Engineer shall be binding on both parties.”

The contractor commenced work under this contract soon after its execution and prosecuted the work until on or about the first day of February, 1908. On the second day of February, 1908, the Secretary of the Interior suspended the contract and took charge of the canal and completed the work covered by the contract on or about the 10th day of November, 1910, with certain deviations authorized by the contract with which we are not now concerned. The Chief Engineer of the Reclamation Service has determined that the cost to the government of completing the work was the sum of \$51,095.05 in excess of the contract price and this action is brought to recover such excess from the contractor. At that date of the execution of the contract the defendant Empire State Surety Company entered into a bond to the United States in the penal sum of \$45,000.00, conditioned for the faithful performance of this contractt by the defendant Weisberger, and the government likewise seeks to recover from the surety

company the full penalty of its bond with interest.

The issues in this case, so far as deemed material, will sufficiently appear in the course of the opinion. The plaintiff offered in evidence the record from the Department of the Interior suspending the Weisberger contract, proved the completion of the contract, with certain deviations and changes which were authorized by the contract itself and proved the excess cost of completing the contract by producing the accounts audited by the Chief Engineer of the Reclamation Service. No attempt was made at the trial to surcharge or falsify the accounts as audited by the Chief Engineer, and at the close of the testimony the Court instructed the jury that the plaintiff was entitled to recover the full amount sued for, less certain offsets agreed upon between the parties, unless they found from the testimony that the Secretary of the Interior acted fraudulently in fact or in law in suspending the contract, or unless they found that the contract as originally entered into was impossible of performance, two of the issues presented by the answer. The jury returned a verdict in favor of the defendants and the plaintiff has interposed a motion for judgment in its favor notwithstanding the verdict of the jury.

The verdict was returned on the 24th day of February, and the motion for judgment was filed on the 29th day of February following. As preliminary objections the defendants object to the form of the motion and to the time of its filing. The objection to the form of the motion is based upon the old common law rule that such a motion will only be granted on the applica-

tion of the plaintiff, and the Court in disposing of the motion is not authorized to look to the evidence. This rule, however, does not obtain in this state. On such motions the Court looks not only to the pleadings but to the entire evidence in the case and directs such judgment as law and justice demand. This rule of practice is adopted and followed in the Federal Courts. Nor is the objection to the time of filing the motion well taken. Under the state practice a motion for judgment notwithstanding the verdict may be interposed within the time allowed by law for filing a motion for a new trial and the two motions are often filed together or combined in one, asking for judgment notwithstanding the verdict or for a new trial, in the alternative. Under the rules of the old Circuit Court a petition for a new trial might be filed within forty-two days after verdict, and this rule is also adopted by the District Court.

It is competent for parties to a contract of the nature of the present one to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and, in the absence of fraud or mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the Courts.

United States v. Gleason, 175 U. S. 588, 602.

But the very extent of the power and the conclusive character of his decision raises a corresponding duty that the agent's judgment should be exercised—

not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties.

Ripley v. United States, 225 U. S. 695, 701.

Such was substantially the charge of the Court in this case, and within the rules thus announced is there any testimony in this record which would warrant the jury in finding that the Secretary of the Interior acted fraudulently or capriciously in suspending the contract in question? I find no such evidence. Indeed, it occurred to me at the trial that the defenses that the contract was impossible of performance and that the Secretary of the Interior acted fraudulently in suspending the contract for failure to perform, were utterly inconsistent, and I am still of that opinion. For if the contract was impossible of performance the Secretary of the Interior could not err in finding that the contractor could not complete it within the limited time allowed. The attention of counsel for defendants was directed to this inconsistency on the hearing of the present motion and they explained the apparent inconsistency in this wise. After the contract was suspended and after the government took over the work it materially modified the method of jointing the shapes in the canal. This change greatly lessened the difficulties and cost of construction. It is the contention of the contractor that he could have performed and completed the contract in the manner in which it was completed after this change was made, and not that he could have completed it according to its original terms. But if the contract was possible

of performance in the first instance the government had a right to insist upon its performance according to its terms and was under no obligation to make changes or modifications therein. It therefore being conceded that the contractor could not complete the work according to its terms at the time of its suspension the Secretary of the Interior certainly did not err in finding that he could not complete it, and any finding of a jury to the contrary should not be permitted to stand.

On the question of the possibility of the performance of the contract the Court instructed the jury as follows:

“If a party by his contract charge himself with an obligation possible to be performed he must make it good, unless his performance is rendered impossible by the act of God, the law or the other party. Difficulties even if unforeseen and however great will not excuse him. If the parties have made no provisions for a dispensation the rule of law gives none—nor, in such circumstances, can equity interpose.”

United States v. Gleason, *supra*.

“The impossibility here referred to is a physical impossibility. If the contract should be performed, no matter how difficult or how expensive the performance might be to the contractor, he is bound by his obligation and Courts and juries can grant him no relief.”

Within these rules I doubt if it can be said that it was impossible to perform the obligation in question, but I am free to say that performance according to

the terms of the original contract and specifications would have been extremely difficult and expensive. The mode of constructing canals was largely experimental with the government and was wholly so with the contractor. This is made apparent by the provision in the specifications, *supra*, that should the contractor, by reason of conditions developing during the progress of the work, find it impracticable to comply strictly with the specifications, and apply in writing for a modification of structural requirements or methods of work, such change may be authorized by the engineer provided it be not detrimental to the work and be without additional cost to the United States. It cost the government fifty-one thousand dollars more than the contract price to complete the work. In addition to this it took over and used the plant, tools and appliances belonging to the contractor, which cost in the neighborhood of seventy thousand dollars. The changes made in the mode of construction after the contract was suspended greatly lessened the cost of construction, so that it is evident that the contract could not have been performed originally for less than almost double the contract price. I am inclined to the opinion that there was a mutual mistake of the parties as to the feasibility of the original plans adopted, for otherwise the contract is, "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Greene v. Taylor*, 132 U. S. 406. And while I am not entirely convinced that the contractor should be relieved from his improvident

contract, yet the equities are strongly in his favor, and I am not so far convinced to the contrary as to feel warranted in ignoring a verdict returned in his behalf. The motion for judgment is therefore denied.

Endorsements: Opinion Denying Motion for Judgment Notwithstanding the Verdict of the Jury. Filed July 20, 1912. W. H. Hare, Clerk. By Edward E. Cleaver, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73,

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY, a Corporation,

Defendants.

JUDGMENT.

The above entitled action came on regularly for trial in the above-entitled Court, Honorable Frank H. Rudkin presiding, on the 19th day of February, 1912, the plaintiff appearing by United States District Attorney Oscar Cain and Special Attorney Ralph Williamson, the defendant Theodore Weisberger and Jane Doe Weisberger appearing by Parker & Richards, their attorneys, and the Empire State Surety Company appearing by John P. Hartman and McAuley & Meigs, its attorneys.

A jury of twelve men was duly and regularly im-

paneled and sworn to try the cause. After hearing the evidence adduced on behalf of the plaintiff and the defendants and the argument of counsel and receiving the instructions of the Court, the jury retired to consider of their verdict and on the 24th day of February, 1912, returned into Court and being called, rendered the following verdict:

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEISBERGER and EMPIRE STATE SURETY COMPANY, a Corporation,

Defendants.

We, the jury in the above-entitled cause, find for the defendants.

R. D. SUNDERLAND,

Foreman."

Said verdict was thereupon duly entered by the clerk of this Court upon his journal, and judgment pursuant thereto noted upon the judgment docket in the office of the Clerk of this Court.

Thereafter, and on the 2nd day of March, 1912, the plaintiff filed a motion for judgment notwithstanding the verdict. Said motion was argued before the Court by counsel for plaintiff and defendants, and the Court having taken the same under advisement and duly considered the same, and being advised in

the premises, now overrules and denies said motion, and gives judgment in favor of the defendants in accordance with the verdict of the jury aforesaid.

Now, therefore, it is ORDERED and ADJUDGED that judgment be, and is hereby entered herein, in favor of the defendants in the above-entitled action, and that said action be, and the same is hereby dismissed.

Entered this 30th day of September, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Judgment on the verdict and order denying motion for judgment notwithstanding the verdict. Filed September 30, 1912. W. H. Hare, Clerk. By Edward E. Cleaver, Deputy.

Notice Served on Theodore Weisberger. RBW-PLH.

North Yakima, Wash., January 2, 1908.

Mr. Geo. F. McAulay,

Agent, Empire State Surety Co.,

North Yakima, Wash.

Dear Sir:

I am handing you herewith a copy of a notice served today on Contractor Theodore Weisberger.

Respectfully,

(Sd.) CHAS. H. SWIGART,

Project Engineer.

Encl.

Filed Jan. 4, 1908.

No. T-3-5.

G. G. M.

North Yakima, Wash., January 2, 1908.

Mr. Theodore Weisberger,
North Yakima, Wash.

Dear Sir:—

Referring to my letter of November 26, 1907, and to certain instructions dated December 27th, relating to the prosecution of your work upon Schedules 6A and 7A of your contract dated January 5, 1907, for the construction of Tieton Main Canal, Tieton Project, Washington, I hereby notify you that the work therein mentioned and ordered has not been done or begun and that the work and delivery of materials provided for in said contract is not being prosecuted in such a manner as to insure a full compliance therewith within the time limit, or at all, and in accordance with Paragraph 22 of the Specifications I hereby instruct you as follows:

1. That on or before January 8, 1908, you begin the work of making such molds as will insure full compliance with your contract.

2. That on or before January 8, 1908, you begin the delivery of cement in accordance with the instructions hereinabove referred to.

3. That you make such financial arrangements, in accordance with Paragraph 37 of said Specifications, as will satisfy the Engineer of your ability to properly carry out the provisions of your contract within their true intent and meaning, and that you furnish

evidence of same to this office on or before January 8, 1908.

Respectfully,
(Signed) CHAS. H. SWIGART,
Project Engineer.

No indorsements; no filing mark.

DEFENDANTS' EXHIBIT "H."
DEPARTMENT OF THE INTERIOR
UNITED STATES RECLAMATION SERVICE.
Office of the Director.

Washington, D. C., October 28, 1907.

Mr. Theodore Weisberger,
North Yakima, Washington.

Dear Sir:—

Under date of October 23, 1907, the Secretary of the Interior granted an extension of time under your contract of January 5, 1907, for the construction of Schedules 6a and 7a of the Main Canal, Tieton Project, Washington. Schedule 6a has been extended to August 1, 1908, with an additional sixty days for curing and acceptance of concrete shapes to October 1, 1908. Schedule 7a has been extended to October 15, 1908.

Very truly yours,
A. R. DAVIS,
Acting Director.

Endorsements: Def. Ident. H.(No filing mark).

DEFENDANT'S EXHIBIT "M."

Subject: Termination of Contract.

JJ-PLH.

DEPARTMENT OF THE INTERIOR.

UNITED STATES RECLAMATION SERVICE.

North Yakima, Wn., August 30, 1907.

Mr. Theodore Weisberger,

North Yakima, Wash.

Dear Sir:—

Referring to my notice to you of August 16th regarding a recommendation that your contract be suspended in the event that you were not making due progress on August 30th, I have to advise as follows:

On my recent visit to the Tieton Canyon, from which I have just returned, I was much impressed with the general progress you have made since the date of my previous visit and feel that you are making every effort to improve the output of your plant. I will therefore, for the present, make no recommendation looking toward the immediate suspension of your contract, but will urge that you will continue in your efforts to increase your output to the end that you may shortly be able to manufacture 100 shapes per day and that you will thereafter continue to improve your plant and the general efficiency of your force in order that your output may be increased be-

yond the 100 shapes per day referred to above. This constant increase I am sure you will appreciate is absolutely essential.

Very respectfully yours,

(Signed) JOSEPH JACOBS,

District Engineer.

Endorsements: Defendant's Exhibit "M." (No filing Mark).

DEFENDANT'S EXHIBIT "M."

En Route Chicago, Jan. 30, '08.

Mr. A. P. Davis, Chf. Engineer, U. S. R. S.,
Chicago, Ills.

Dear Sir:—

Regarding your letter of Jan. 29 to the director on Weisberger contract, upon carefully rereading it I find you state that it may be inconvenient and unduly expensive to transport shapes to the canal. This statement, while agreeing with Weisberger's views, is not supported by reports sent in by Messrs. Hopson & Swigart, now on file in your office. I very much regret that I did not call your attention to this apparent discrepancy.

I have looked upon your letter as giving your views as to what is proper to do in case the contract be continued in force and in so far as I can agree with you.

As regards suspension itself, I have not withdrawn from my previous position. When I recommended earliest possible suspension, I felt that we, I mean myself and my assistant were more or less under in-

vestigation, and did not deem it proper after the very positive recommendation made to urge the matter unduly and I was particularly anxious to have you and the director obtain the fullest possible information before deciding. This also seemed to me generally the best policy although regretting the time thus lost. It was with this end in view that I had suggested to Weisberger to be prepared to make a full financial showing and when he arrived in Washington still unprepared that he spend the extra day in New York. Briefly reviewing the reasons for my previous recommendation I wish to state as follows:

First. Failure to comply with engineer's notices on the part of the contractor.

Second. Strong recommendations made by Messrs. Hopson & Swigart.

Third. Financial weakness of contractor.

Fourth. Greater probability of completion this year under suspension.

The first two reasons will stand. The third may possibly be mended. The fourth becomes weaker every day and in any event I trust it may be left to our judgment even in case of suspension to map out the proper and most economical course.

Whether Mr. Swigart's local control over the contractor might be injuriously affected by his recommendation being turned down is a matter which you and the director can judge equally as well as myself. It is inherent to such cases and I have therefore refrained from advancing it as a reason for favorable action on recommendations.

I feel that all the engineers will cheerfully accept the decision whatever it is and it is only hoped that it may be rendered *soon*.

Yours very respectfully,

(Signed) D. C. DENNY,

Supervising Engineer.

Endorsements: Defendant's Exhibit "M." (No. filing mark).

DEFENDANT'S EXHIBIT "N."

Subject: Instructions to Weisberger. E. McC-RWM.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE.

Tieton Canal, Canyon Division, November 4, 1907.
Mr. Theodore Weisberger,
Tieton Canyon.

Dear Sir:—

In accordance with Specifications No. 116 and particularly Paragraph 59A, you are instructed to discontinue the manufacture of concrete shapes on Schedule 6A, after filling the 70 forms which are in place this morning.

This operation is to continue not later than noon of November 5th, 1907.

Very respectfully,

(Signed) E. McCULLOH.

Endorsements: Defendant's Exhibit "N." (No filing mark).

DEFENDANTS' EXHIBIT "V."

Weisberger Contract.

North Yakima, Wash., October 3, 1907.

Supervising Engineer,
Portland, Ore.

Referring to your letter of September 27, I thought it best not to write the Chief Engineer until I had had a personal interview with Mr. Weisberge,r which I immediately requested upon reciept of your letter. He, however, failed to call until yesterday, and I now hand you herewith copy of letter I have just written to the Director regarding the matter of payment to him on shapes already made, which I trust will meet with your approval.

Regarding his refusal to insert permanent supports under the cross bars, Mr. Weisberger denies having made such refusal. He does state, however, that he feels that it is not clearly contemplated by the specifications and that he should be allowed extra for this work.

I stated to Mr. Weisberger that this was a matter of no particular moment at this time, the important item being that the supports should be left in, that if he thought the specifications clearly entitle him to extra allowance for this work, he would only need to present his claim for same and it would receive fair consideration. I stated to him further that our present view of the matter was that he would not be entitled to such extra allowance.

Mr. Weisberger, I think, fully realizes his position and his dependence on our good will, and says that

he desires everything to move as agreeably and pleasantly as possible, that he is willing to comply with all reasonable requests we may make. He did state, however, that he found that neither he nor Mr. Kronholm could discuss these matters as satisfactorily as he desired with Mr. McCulloh, as the latter generally approached them in such a manner as to make misunderstandings quite possible. There has, of course, been no serious friction, and he mentioned it only as accounting for such little friction as has already developed. I shall, of course, take this up in proper manner with Mr. McCulloh when occasion presents. I anticipate, in fact, leaving for the Canyon tomorrow.

(Signed) JOSEPH JACOBS,

District Engineer.

Endorsements: Defendants' Exhibit "V." (No filing mark).

DEFENDANTS' EXHIBIT "U."

Extension of time Weisberger contract—Tieton Project.

EGH-HTC.

July 18, 1907.

District Engineer,

North Yakima, Washington.

I am in receipt of your application for an extension of time on schedules 6A and 7A, Tieton main canal. On the whole I approve of this extension of time, and propose to forward it to Washington for approval in the near future unless later development should occur modifying the situation. You may, however, notify

Mr. Weisberger that his application has been received and is under consideration.

I do not believe it advisable to take any action at this juncture, and would prefer to wait at least two or even three months before transmitting it to Washington. In the meantime we must urge Weisberger to get some results accomplished, otherwise we will take the work out of his hands.

(Signed) E. G. HOPSON,
Acting Supervising Engineer.

Endorsements: Defendants' Exhibit "U." (No filing mark).

DEFENDANTS' EXHIBIT "O."

Subject: Laying Concrete Shapes. JJ-PLH
DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE.

North Yakima, Wash., October 22, 1907.

Mr. Theodore Weisberger,
North Yakima, Wash.

Dear Sir:

Referring to my letter to you of October 9th, urging the immediate commencement of laying of concrete shapes.

The matter of cracks developed in the handling of these shapes has just been reported to me and I desire therefore that the matter of the handling of these shapes in laying be carefully considered and discussed between us before the actual laying now begins.

The Supervising Engineer is due here today and

during his stay we will endeavor to see you and review this matter verbally.

Respectfully,
(Signed) JOSEPH JACOBS,
District Engineer.

Endorsements: Defendants' Exhibit "O." (No filing mark).

Copy to Mr. McCulloh.

DEFENDANTS' EXHIBIT "T."

Suspension of the Weisberger Contract.

Jan. 31, 1908.

The Director,
U. S. Reclamation Service,
Washington, D. C.

Sir:

I inclose herewith a letter I have just received from Mr. D. C. Henny, which he left at the Chicago office for me. This should be taken into consideration in connection with recommendations on the Weisberger contract which I left with you.

As stated in Mr. Henny's letter, the contractor has given us ample legal reason for suspending the contract if it is considered the wisest thing to do, and I have no question but that the Reclamation Service could, and would push the work more rapidly if the contract were suspended, than if the contractor is allowed to continue.

It is probable that the contractor in making his recent protests against suspension, was not aware that any profit that could be made by the Reclamation

Service after suspending the contract, would go to him. Probably he is not as much opposed to suspension as he once was, and I certainly should not object to suspension as Mr. Henny suggests.

Up to date we have never suspended a contract against the wish of the contractor, and it is, of course, not a very desirable thing to do, but I believe by doing it we would distinctly increase the probability of delivering water on the Cowichee lands in 1909.

As Mr. Weisberger's financial showing is entirely unknown to me, I am unable to make any definite or positive recommendations other than those contained in my letter and the considerations pointed out by Mr. Henny.

Respectfully,

1 Inc.

(Signed) A. P. DAVIS,

CC-D. C. Henny.

Chief Engineer.

Endorsements: Defendants' Exhibit "T." (No filing mark).

DEFENDANTS' EXHIBIT "W."

Weisberger's Contract—Tieton Project.

September 27, 1907.

District Engineer,

North Yakima, Washington.

In answer to your letter of September 25, in which you state that the contractor refuses to leave in the wooden support below the cross bar of the concrete shapes, I note your statement that the specifications provide for this by clause 104A. My own views are not, however, that we propose to pay for this as extra

work, to which clause 104A refers. Clause 112A states:

“The forms or moulds shall be of sufficient strength and rigidity to prevent springing or deformation of the concrete shapes. They shall be built according to designs prepared by the contractor and approved by the engineer.”

This is the clause on which I would base our right to have the wooden supports left in place. As I have already explained to you, the leaving in permanently of the wooden base was the subject of a discussion between Mr. Weisberger and myself prior to the acceptance of his design of the moulds. I explained to Mr. Weisberger very clearly that this wooden form would have to be sacrificed until such times as the shape was removed, or as long as it remained in a horizontal position, and Mr. Weisberger fully concurred with me and agreed to it. The reasons for this are obvious and need not be further entered into. We may justly claim that the entire design of the concrete form is dependent upon the detachable wooden support for the cross bar and that the removal of this wooden support at too early a date may lead to the rejection of the work under clause 30, 101A, or 112A.

I note that you have rejected 27 shapes up to September 19 but that you are considering the ultimate acceptance of a large proportion of these. It is possible that Mr. Weisberger may consider that you have been unduly harsh in your rejections and in consequence he may have declined to place the wooden supports with a view to driving a bargain with you later on.

In any event I cannot help thinking from my own knowledge of Mr. Weisberger and his foreman that there ought to be little difficulty in securing their compliance with our desires in this particular, and that the entire question is one of a little diplomacy and proper handling.

As matters now stand, Weisberger's success or failure in his work rests practically on the action of the engineers. One may say that he is almost wholly dependent upon their favorable consideration and treatment, and it would appear to be a very unbusinesslike proceeding on the part of Weisberger himself to antagonize in any way the engineers by refusing to carry out so obviously reasonable an obligation and one which involves so small an expenditure. My own impression has been that Mr. Weisberger has been only too anxious to do good work and that to secure this end he has been unwilling to make a number of sacrifices. On these grounds alone I should think he would be very glad to put the small amount of extra lumber necessary to furnish these wooden supports.

It is evident that for the interests of the Government we do not want to shut down Mr. Weisberger's work even for a day or two, as any interruption to his operations would lead to the very rapid dissolving of his entire force, and it is probable that operations would not again be resumed this season. I consider from every point of view the situation is one requiring diplomacy rather than force, although the latter must be ultimately resorted to in the event of the failure of the former. I believe you had yourself a five min-

utes' conversation with Mr. Weisberger you would get the matter straightened out satisfactorily, and I would strongly urge that you look into the matter personally.

Acting Supervising Engineer.

Endorsements: Defendants' Exhibit "W." (No filing mark).

DEFENDANTS' EXHIBIT "X."

Extension of time contract Theo. Weisberger.

GGM-Htc.

July 17, 1907.

District Engineer,

North Yakima, Washington.

Your favor of the 15th together with application for extension of time by Mr. Theodore Weisberger on his contracts schedules 6A and 7A Tieton Main Canal, dated January 5, 1907, contract No. 147, also approval of bondsmen and your certificate, have been received. Before forwarding this application to Washington it will be necessary for you to supply a report in accordance with Memorandum No. 89, paragraph 4, which reads as follows:

"In forwarding requests for extension of time the engineer should report upon the facts alleged as grounds for extension, etc."

Following down, it reads:

"If he recommends favorably he should *in addition* transmit formal certificate in duplicate, etc."

Acting Supervising Engineer.

Certificate to accompany request of Theodore Weisberger for extension of time on Contract.

No. 147.

I hereby certify that in my opinion, failure to begin the work required by contract No. 147, dated January 5, 1907, between the United States and Theodore Weisberger, for Schedules 6A and 7A, Specifications No. 116, Tieton Project, Washington, as specified by paragraph 43A of said specifications, was due to unavoidable delays from cause unforeseen at the time of making the contract, which were undoubtedly beyond the control of the contractor, and which will make impossible the completion of this contract within the time specified in said paragraph. For these causes, as hereinafter more fully stated, the amount of this delay was four months, and I recommend an extension of time for completion of said contract as requested by the contractor.

The causes were as follows:

Unprecedented delays in freight shipments, owing to the extraordinary floods which occurred throughout the Northwest in the fall of 1906 and the spring of 1907, interfering greatly with transportation facilities. The amount of delay due to this cause can be estimated at two months.

The failure of the United States to complete the wagon road in the Tieton Canyon during the winter of 1906-7, which work was again delayed by the above-mentioned unprecedented floods, and also by an unusual amount of snowfall in the Tieton Canyon. I estimate that the delay caused to the contractor by

non-completion of this road, and the impossibility of getting freight and machinery to the proper site amounts to four months. I desire to state, however, that this four months is not in addition to the two months' delay above mentioned, but overlaps the same.

By paragraph 43A of the specifications the contractor is obligated to complete Schedule 6A on or before November 1, 1907. Owing to the character of the work on this schedule, to-wit: the manufacturing and curing concrete shapes, it would not be safe nor to the best interests of the United States to attempt to manufacture and cure these concrete shapes after November 1, 1907, under weather conditions prevailing during that period of the year in the Tieton Canyon. Consequently, an extension of four months, dating from November 1, 1907, would be ineffective, if so granted, and if the contractor should be compelled to continue this work during the four months beginning November 1, the interests of the United States would suffer.

I further certify that the work on Schedule 6A can not properly be done until the following spring, and therefore recommend that the four months' extension above referred to be granted from April 1, 1908.

Paragraph 101A of the specifications requires that final inspection will be made sixty days after the manufacture of each shape. I therefore recommend an extension of time on Schedule 6A of four months, dating from April 1, 1908, plus sixty days, required to cure the manufactured shapes, thus advancing the

time of all work under said schedule to October 1, 1908.

By Article 43A it is required that Schedule 7A be completed by March 31, 1908. For the same reasons as outlined above for the extension of time for the completion of Schedule 7A to October 15, 1908, it being impossible to complete the laying of shapes in a shorter time than two weeks after the final inspection of the last shapes manufactured.

I would further certify that owing to the failure of contractors to bid on Schedules 2A, 3A, 4A and 5A, of specifications No. 116, and owing to the fact that the United States was forced to prosecute the work upon these schedules without contract, and owing to the fact of delays in transportation facilities, as outlined above, the prosecution of the work upon Schedules 2A, 3A, 4A, and 5A has been hindered and delayed, and cannot be completed by the United States within the time called for in the original specifications.

The completion of this work is necessary before work on Schedule 7A can be prosecuted, which gives additional reason for my recommendation that an extension be granted as requested.

Respectfully,

(Signed) JOSEPH JACOBS,

District Engineer.

North Yakima, Wash. July 15, 1907.

Endorsements: Defendants' Exhibit "X." (No filing mark).

PLAINTIFF'S EXHIBIT "6."

Irrigation Plants,	Asphalt
Canals, Flumes,	Concrete
Wood Pipe.	Steel.

THEODORE WEISBERGER,

Contractor.

North Yakima, Washington.

Steel and Concrete Construction, Tieton Canal.

North Yakima, Wn., Nov. 7, '07.

Mr. Joseph Jacobs,

Engineer U. S. R. S.

North Yakima, Wn.

Dear Sir:

The financial situation has come to such a pass here that I am quite certain that the bank will not put out the actual cash necessary to cash our monthly payroll checks.

It would materially help the situation here if some means could be devised to get the cash instead of check, or send the check and have the Assistant Treasurer send the cash to either one of the U. S. Depositories here to cover the check.

The situation resolves itself into this: when my check comes I will be unable to use it because the local banks will not cash it. If you will use every effort to secure prompt payment of the estimate now in, it will help me out of this predicament and you may be sure I will appreciate the favor.

Very truly,

(Signed) THEODORE WEISBERGER.

Endorsements: Plaintiff's Exhibit "6."

U. S. Reclamation Service, North
Yakima, Wn., Received November 8, 1907.

Filed Nov. 15, 1907, No. 93-5.

J. J.

PLAINTIFF'S EXHIBIT "7".

Copy.

North Yakima, Wash., July 5, 1907.

Mr. Joseph Jacobs,

Engineer U. S. R. S.

North Yakima, Wash.

Dear Sir:

Referring to your request for more specific information concerning my application for extension of time upon Schedules 6A and 7A of the specifications for the Main Canal of the Tieton Project handed you on April 30, 1907, I give you below the delays in detail.

1st. The United States was unable to complete the wagon road in the Tieton Canal in the time agreed upon in Paragraph 47A, because of the floods in November, 1906, and the deep snow in the spring of 1907.

On March 17th the writer packed blankets and provisions over the site of the proposed road, over three feet of snow. One-half mile beyond Camp No. 3, as now established in Tieton Canyon, there was no road—not even a trail. On May 20th the first heavy load of machinery passed over the road as

completed by the United States. The delay caused from the above to the contractor I commute to be four months.

2nd. The delays experienced through lack of sufficient railway transportation facilities were as follows: One car sheet steel ordered from the Yakima Hardware Company on Jan. 6, 1907, delivery 87 days, normal time of delivery 2 weeks, delay 73 days; one Turbine ordered from Bates and Clark, Seattle, Wash., Jan. 12, 1907, arrived April 26, 1907, delivery 104 days, normal time of delivery 2 weeks, delay 90 days; two crushers, two gravel screens and two gravel elevators, ordered from Beall & Company, Portland, Ore., on Jan. 12, 1907, arrived March 9, 1907, delay 34 days, normal time of delivery two weeks; two concrete mixers ordered from F. T. Crow and Co., Seattle, Wash., Jan. 31, 1907, arrived March 28, delivery 87 days, normal time of delivery two weeks, delay 73 days.

You will note in the above that one delay overlaps another, and from all sources, I have computed in my letter of April 30, that the delays would total four months, making it improbable that the last section of concrete could be cast before August 1, 1908. Allowing that cold weather will set in in November 1, 1907, and thus preclude the possibility of any concrete work being carried on after that date, you will see the justness of my position when I ask for an extension of time, extending during four months of the season of 1908, to-wit: from April 1 to Oct. 1 on Schedule 6A, and as Schedule 7A can

not be carried forward except as Schedule 6A progresses, the delay would also apply to Schedule 7A, making the period of delay on Schedule 7A extend to October 15, 1908. April 1, 1908, would be the earliest date for the beginning of concrete work in the Tieton Canyon, during the season of 1908.

Trusting you will find this satisfactory and that the extension of time will be allowed, I am,

Very truly,

(Signed) THEODORE WEISBERGER.

Endorsements: Plaintiff's Exhibit "7". (No filing mark.)

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEISBERGER and EMPIRE STATE SURETY,
a Corporation,

Defendants.

ACCEPTANCE OF SERVICE OF BILL OF
EXCEPTIONS.

Service of a copy of the Bill of Exceptions filed in the above-entitled Court, is hereby admitted this 1st day of November, A. D., 1912.

(Signed) PARKER & RICHARDS,

Attorneys for Defendants Weisberger.

(Signed) JOHN P. HARTMAN and
McAULEY & MEIGS,

Attorneys for Defendant Empire State Surety Company.

Endorsements: Acceptance of Service of Bill of Exceptions. Filed November 8th, 1912. W. H. Hare Clerk, by Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Southern
Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEISBERGER and EMPIRE STATE SURETY COMPANY,

Defendants in Error.

NOTICE OF FILING OF BILL OF EXCEPTIONS.

To the above named defendants, and to their Attorneys of Record, Parker & Richards, John P. Hartman and McAulay & Meigs:

PLEASE TAKE NOTICE, That the plaintiff has filed in the office of the Clerk of the above-named Court its proposed Bill of Exceptions, a copy of which is hereto attached, and will ask the Court to certify the same as the Bill of Exceptions in this case.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,
Assistant United States Attorney.

(Signed) RALPH B. WILLIAMSON,
Special Assistant to the United States Attorney.

Endorsements: Service of a copy of the within notice is hereby admitted this 1st day of November, 1912.

(Signed) PARKER & RICHARDS,
JOHN P. HARTMAN and
McAULEY & MEIGS,
Attorneys for Defendants.

Notice of filing Bill of Exceptions. Filed October 30, 1912. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER and EMPIRE STATE
SURETY COMPANY,

Defendants.

BE IT REMEMBERED, that this cause came on regularly for trial, in open Court, at 1:30 o'clock p. m., this 17th day of February, A. D. 1912, in said Court, before Honorable Frank H. Rudkin, Judge, and a jury, the plaintiff appearing by its attorneys and counsel, Oscar Cain and Ralph B. Williamson, the defendant Weisberger appearing in person and by his attorneys, Messrs. Parker & Richards, and

the defendant Empire State Surety Co., appearing by its attorneys, Messrs. McAuley & Meigs.

THEREUPON proceedings were had in said cause as follows, to-wit:

MR. CAIN: If the Court please, we want to ask to amend the complaint in this case by setting out two paragraphs of the contract, and those paragraphs which provide that the supervising engineer shall be the auditor of the accounts, all those paragraphs, whatever their numbers are. It will probably not necessitate any new evidence, if the Court takes our view of the law; it will tend rather to restrict the inquiry than broaden it, so it will not in any way hamper—

THE COURT: The contract part of the pleadings now?

MR. CAIN: The contract is pleaded in the answer, I think.

MR. MEIGS: Yes, I think we pleaded the entire contract. If the Court please, I am representing the interests of the Bonding Company and not Mr. Weisberger.

THE COURT: I think the contract was before me over in Spokane.

MR. WILLIAMSON: It is alleged in our complaint the contract was entered into and they admit it had been entered into.

MR. MEIGS: Either in our answer or the answer of defendant Weisberger we plead that a copy of the contract has been furnished us, and by reference we make it part of the complaint.

THE COURT: I remember when I passed on the demurrer in Spokane the contract was deemed a part of the pleadings.

MR. RICHARDS: I think on that general statement there would probably be no objection to the amendment. I would like to see it, however.

MR. CAIN: I will dictate it and serve it on you this afternoon. The amendment won't require any additional witnesses on your part.

THE COURT: With that understanding you will prepare the amendment this afternoon and serve it on counsel and let them make such answer as the amendment will call for.

(Jury duly impaneled and sworn to try the cause.)

Whereupon adjournment was taken until February 19, 1912, 10:00 a. m.

North Yakima, Washington, February 19, 1912, 10:00 a. m.

MR. RICHARDS: The government claim their right to file their amended complaint. Your Honor will recollect they were to submit that amendment. When they do submit it I find it is an entirely different matter than what I understood. I now want the matter to be presented to the Court and the Court determine whether they have any right to file this amended complaint. I think I have that right, have I not?

THE COURT: I supposed the amended answer was agreed upon.

MR. RICHARDS: Your Honor said, "You will prepare your amendment and submit it," and I re-

served the right at that time to determine whether we could accept it or not. Now I want to call Your Honor's attention to the matter to see what the purport of that amendment is.

MR. CAIN: I think Your Honor can probably read it quicker—

MR. RICHARDS: Now, if the Court please, as regards the first and last amendment, it don't make much difference, they have been admitted in the answer, in regard to the copy of the contract. We admit the receipt of copy of the contract so those are not material, but that allegation at the end of the 7th paragraph that "after the completion of the work attempted by said contract," and so forth, "and made a part hereof." There is only one purpose in that, Your Honor, and that is to make a part of their complaint and undertake to show the fact that the accounting of the work done by the government after the suspension of this contract by the officers of the government is in some way binding upon the defendant in this case. When the matter was mentioned here the other day I supposed that they meant the accounting of the work up to the time of the suspension. Now, the only provision in the contract in regard to an accounting in that matter and the binding effect of it is contained in the 8th paragraph (reading same.) That is the provision when the contract is in force. Now, under all the authorities, federal and otherwise, when the government suspended this contract it ceased to be a contract, and the work that was done after that by the government was

done under a different proposition entirely, nor is there any provision that the engineer shall determine that or that the auditing of those claims will in any way affect the matter after the contract is suspended. We are not without authority on this subject and I will just call Your Honor's attention briefly to one case here (citing same).

THE COURT: That would rather go to the materiality of it than anything else, wouldn't it?

MR. RICHARDS: If they are allowed to put in this amendment at this time then we are forced to move against it. We can't accept that amendment and go into the trial of this case and stand upon our denial or our admission at this time (citing authorities).

(Continued argument by counsel.)

MR. CAIN: We contend that the condition set forth in the proposed amendment is within the provision of the contract and as provided by the contract.

THE COURT: Of course, if the contract contains no further provision as soon as it is breached the contract is at an end and the law fixes the measure of damages, but it is common practice for construction contracts to provide not only what shall be done while the contract is in force but expressly provides for a breach and for the completion of the work after the breach. I haven't the slightest doubt in the world the engineers, both as to the suspension of the work and the cost of completing it after the suspension, their decisions are final in the absence of fraud or such gross mistake as would imply bad

faith, and I think the two provisions referred to are broad enough for that purpose. Section 22 expressly provides what shall be done in case of a breach, provides for the completion of the contract at the cost of the contractor, and another provision makes the engineer's decision final. I do not feel called upon to pass upon the question finally at this time, but that is my view of the effect of the contract, and the motion will be denied. I may arrive at a different conclusion after examining the authorities.

MR. RICHARDS: I note an exception to the ruling of the Court.

THE COURT: I would suggest to counsel now, in view of the late hour this motion has come in, if I am correct in my view of the law, to demand some different answer than has been filed here.

MR. RICHARDS: We would want some time to determine what we would want in regard to that.

THE COURT: Are you ready to proceed and take your own time to file an answer, or would you prefer to take the time now?

MR. RICHARDS: We would prefer to take the time now.

THE COURT: Court will be adjourned until 2:00 p. m.

Proceedings resumed at 2:00 p. m.

Opening statement to the jury on behalf of the United States made by Mr. Williamson.

THE COURT: I will state to counsel now you can't try an action without pleading the action, and probably this answer will call for some reply.

MR. CAIN: We will just make a general denial.

THE COURT: You can file that afterwards then.

MR. MEIGS: I would like at this time, if the Court please, for the record to show that the counsel for plaintiff waives verification of the answer of the Empire State Surety Company?

THE COURT: You can endorse their waiver on the answer.

MR. MEIGS: Yes.

MR. RICHARDS: I prefer to reserve my statement.

THE COURT: Proceed with the proof, gentlemen.

MR. WILLIAMSON: We will offer this contract certified to, in Section 802 of the Revised Statutes, by the Secretary of the Interior, as Plaintiff's Exhibit "1".

THE COURT: They are admitted in the pleading.

MR. WILLIAMSON: Yes, sir.

MR. RICHARDS: There is no objection to this, if the Court please.

THE COURT: It will be received.

MR. WILLIAMSON: I want to ask the defendants for the original letter of January 2, 1908, addressed to Theodore Weisberger.

MR. RICHARDS: Here it is (producing same).

MR. WILLIAMSON: We introduce this letter as Plaintiff's Exhibit "2".

MR. RICHARDS: Objected to, Your Honor, as incompetent, irrelevant, immaterial, not affording any proper basis for suspension of the contract sued upon, that the three requirements set forth in the letter,

(Testimony of Arthur P. Davis.)

if there was a failure to comply, that they are not sufficient to warrant a suspension, and that there is no basis whatsoever in the contract for the third requirement set forth in this letter.

MR. WILLIAMSON: It purports to be certified, Your Honor, under paragraph 22.

THE COURT: The objection will be overruled.

Objection. Overruled. Exception.

MR. RICHARDS: I want to add to that, if the Court please, that the notification as such is not signed by the party having authority to give that notice. I think that third paragraph ought not to go into the case even if the other does. If Your Honor examines the contract you will find that the only provision there is for requiring any showing as to financial standing or ability to perform is the showing that he can make when he makes his bid before the contract is let, and that requirement there was entirely outside of their power to require.

THE COURT: I will determine that when the order of suspension is offered. I don't know who this party is who signs this letter or anything about it.

ARTHUR P. DAVIS, produced as a witness on behalf of the plaintiff, having been first duly sworn, testified:

DIRECT EXAMINATION.

Q. (Mr. Williamson) What are your initials, Mr. Davis?

A. Arthur P. Davis is my name.

(Testimony of Arthur P. Davis.)

Q. What is your occupation?

A. Engineer.

Q. By whom employed?

A. By the United States.

Q. What is your position with the United States?

A. Chief Engineer of the Reclamation Service.

Q. I hand you a document. That document is signed "Charles H. Sweigart." Will you state, Mr. Davis, who is Mr. Charles H. Sweigert?

A. Charles H. Sweigert, who signs this letter, is an engineer employed by the United States Reclamation Service, who was at the time he signed it and still is in charge of the project known as the Yakima Project.

Q. Do you know Mr. Sweigart's signature; are you acquainted with Mr. Sweigart's signature?

A. I am.

Q. Is that Mr. Sweigart's signature?

A. It is, in my opinion.

MR. WILLIAMSON: I offer this in evidence as Plaintiff's Exhibit "2".

MR. RICHARDS: I object and move, if the Court please, to strike the evidence and deny the introduction of the exhibit on the ground the signature has not been identified.

THE COURT: It has been sufficiently identified, that is, as to his authority. The question is whether he is a party to the contract.

MR. RICHARDS: That was covered by my other objection.

(Testimony of Arthur P. Davis.)

THE COURT: His relation with the department is sufficient and the signature has been proved sufficiently.

MR. RICHARDS: I don't believe he has proved that is Sweigart's signature. There is no doubt he should prove it, but I don't think his evidence proves it.

THE COURT: That is as far as any man can go on verifying a signature. I will overrule the objection.

Objection. Overruled. Exception.

MR. WILLIAMSON: That is all.

(Witness excused.)

MR. WILLIAMSON: Plaintiff offers in evidence several letters certified to under Section 882 of the Revised Statutes—

MR. RICHARDS: Did you offer that?

MR. WILLIAMSON: I am just offering it.

MR. RICHARDS: If the Court please, I will hand this to the Court to look over first. I object to the introduction of these instruments offered, Plaintiff's Identification "3", on the ground the same are incompetent, irrelevant, immaterial, that they afford no evidence of any action on the part of the United States government or by the proper authorities suspending this contract; that they are not sufficient to constitute a valid suspension of the contract under its terms and under the law applicable to contracts of this sort and the suspension thereof; that the notice of suspension given to Mr. Weisberger is not signed

by the proper authority, by anyone having authority to give such notice; that these instruments do not show that any action was ever taken by the Secretary of the Interior for the suspension of this contract; that they do not show that he ever exercised his judgment in the matter or took any affirmative action in the premises.

THE COURT: I don't find anything in these letters indicating that he did.

MR. RICHARDS: That is my contention.

THE COURT: Your statement that some other officer did is no indication that he did.

MR. WILLIAMSON: Of course, the matter of handling those things in Washington —

THE COURT: Where is the evidence that he did?

MR. WILLIAMSON: On the original, the endorsement.

MR. RICHARDS: Now, if the Court please, if Your Honor considers that that overcomes your suggestion in any manner—do you care to hear—

THE COURT: I will hear from you.

(Argument by counsel.)

THE COURT: I supposed it was admitted in the former answer he did suspend it.

MR. RICHARDS: It was an absolute denial in the former answer that he suspended it lawfully.

THE COURT: Well,—

MR. RICHARDS: They were based on the theory there was no rightful suspension, which would be the same as no suspension at all. You can take it

either way as far as those affirmative defenses are concerned.

THE COURT: I am not concerned whether the suspension was rightful or wrongful, but whether there was a suspension.

MR. RICHARDS: We maintain there never was any such action on the part of the Secretary of the Interior that amounted to a legal suspension of that contract.

THE COURT: But the fact of suspension is admitted in the answer.

MR. RICHARDS: It is admitted the government took possession of the stuff and excluded Mr. Weisberger from the property.

THE COURT: I will hold the proof is sufficient it was an actual suspension, but whether it was a valid one or not will come up at a later stage of the trial. The objection will be overruled.

MR. RICHARDS: I don't think what constituted suspension, if there was any here, is the acts of these officers going upon these works and taking it away from Mr. Weisberger, as we have alleged in our answer.

THE COURT: Of course, the parties never contemplated the Secretary of the Interior should come out here and suppress the construction of this ditch. He had to act on reports of some sort. I think his approval on there is equivalent to suspension under the terms of the contract.

(Testimony of Arthur P. Davis.)

MR. RICHARDS: I note an exception to the ruling of the Court.

THE COURT: I will state, however, the recitals contained in that answer are no evidence against the defendant here.

MR. WILLIAMSON: I offer this as Plaintiff's Exhibit "3".

MR. RICHARDS: We except to the allowance of that.

THE COURT: Yes.

MR. MEIGS: I want to refer to the first exhibit introduced by the plaintiff and move that the same be stricken and expunged from the record for the reason that it appears that this letter antedates the contract between the plaintiff and the defendant Weisberger. The letter is dated January 2, 1907, and the contract is dated January 5, 1907.

THE COURT: What is the date of the approval?

MR. WILLIAMSON: February 7, 1908. It is really a typographical error, Your Honor.

MR. MEIGS: I object to counsel testifying in the matter.

THE COURT: I think the fact it is a clerical error appears on the face of the record. The motion will be denied.

MR. MEIGS: We save our exception.

ARTHUR P. DAVIS, re-called as a witness on behalf of the plaintiff for further direct examination, testified as follows:

(Testimony of Arthur P. Davis.)

Q. (Mr. Williamson) You have already testified you were Chief Engineer of the Reclamation Service, Mr. Davis. Were you Chief Engineer of the Reclamation Service on January 5, 1907?

A. No, sir.

Q. Were you Chief Engineer of the Reclamation Service on February 1st, 1908?

A. I was.

Q. Were you connected with the Reclamation Service on January 5, 1907?

A. I was.

Q. In what capacity?

A. Assistant Chief Engineer.

Q. How long have you been with the Reclamation Service, Mr. Davis?

A. Since some time in July, I think it was, 1902, shortly after the organization.

Q. Of your own knowledge who was Secretary of the Interior on the first day of February, 1908?

A. I know.

Q. Who was it?

A. James Rudolph Garfield.

Q. There are letters in evidence signed by Morris Bean, Acting Director. Was Morris Bean an employe of the Reclamation Service at that time?

A. He was.

Q. In what capacity?

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Arthur P. Davis.)

THE COURT: I presume the Court would be obliged to know—I will overrule the objection.

Objection. Overruled. Exception.

A. Morris Bean was Supervising Engineer in charge of land and legal matters.

Q. (Mr. Williamson) Did he have authority at any time to execute documents as Supervising Engineer?

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial.

THE COURT: I don't think he can prove authority in that way.

MR. WILLIAMSON: I don't know it is particularly necessary to prove his authority other than he was connected with the service.

THE COURT: I presume he derived his authority from some statute.

Q. (Mr. Williamson) Mr. Davis, you have personal knowledge of the work covered by this contract?

A. In a general way, yes, sir.

Q. Would you briefly state to the jury the description of that work and the work covered by that contract? (Exhibiting paper to witness).

A. The work that the contractor was required to do by this contract was the manufacture of certain shapes of reinforced concrete. Those shapes were circular in form, each one a little more than a half circle, with a bar across the top to give them stiffness, about four inches in thickness and I think two feet in width. Those were to be placed in a canal to be

(Testimony of Arthur P. Davis.)

constructed by other authority—not by this contractor—in a side hill in the side of that canyon, and to be cemented together in such a way as to form a tight lining or flume inside of the bench excavated, the bench or canal excavated. He also contracted to make certain shapes, circular in form, and place them inside of the tunnel and similarly cement them together, forming a lining to that canal.

Q. Do you know whether or not Mr. Weisberger completed that work?

A. I do. He did not complete it.

Q. How was the work completed?

A. It was completed by the forces of the United States, employed directly by the United States.

Q. Do you remember approximately the date when the government took up that work?

A. It was early in 1908, as I remember it.

Q. When was the work finished, Mr. Davis?

A. I don't remember the exact date. I think in the latter part of 1909 some time.

Q. During all times since February 1st, 1908, you have been Chief Engineer of the Reclamation Service, have you, Mr. Davis?

A. I have.

Q. Do you know whether or not there was any excess cost connected with the completion of this work?

A. There was.

MR. WILLIAMSON: I offer this for Plaintiff's Identification "4".

(Testimony of Arthur P. Davis.)

MR. RICHARDS: Objected to as incompetent, irrelevant, immaterial and not tending to prove any of the issues in the case.

Q. (Mr. Williamson) I would like to ask you, Mr. Davis, as to who were your representatives upon this work during the time this contract was completed, that is, your representatives and engineers in charge of the project office?

A. The man in charge of the project as representative of the Chief Engineer was Mr. Charles H. Sweigart. He had various assistants. Do you want them named?

Q. What relation to you was Mr. J. S. Conway?

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial.

THE COURT: I will overrule the objection. It is preliminary.

Objection. Overruled. Exception.

A. Mr. Conway was an engineer of the service assigned to the assistance of Mr. Sweigart and others to act in Mr. Sweigart's stead in his absence as Project Engineer.

THE COURT: I don't know whether that is called for by your contract or not.

MR. WILLIAMSON: Well, of course this is only part of it. It is not the full proof.

THE COURT: The contract provides the decision of the Chief Engineer shall bind the both parties.

MR. WILLIAMSON: Of course, Your Honor, the Chief Engineer can't go out and do this work,

(Testimony of Arthur P. Davis.)

he has got to go out and get some one to do it for him.

THE COURT: If he has approved these accounts—

MR. WILLIAMSON: That is what I want to show.

THE COURT: If you will follow it up by other proof I will withhold my ruling until you do that.

Q. (Mr. Williamson) That purports to be what, Mr. Davis (exhibiting paper to witness)?

MR. RICHARDS: Wait a moment. I object to that form of getting at that matter. Is this the same paper you offered a moment ago?

MR. WILLIAMSON: Yes.

MR. RICHARDS: He offers this in evidence, Your Honor withholds the ruling, then he asks Mr. Davis what it purports to be. I object to that.

THE COURT: It shows what it is on its face, I presume.

Q. (Mr. Williamson) Mr. Davis, what is the method adopted by you in making up these accounts of cost upon work of this class?

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial.

THE COURT: You may answer that question.

A. A record is kept of all material purchased and of all men hired with their salaries and pay of any kind and all the work performed by them. The amounts charged—the amounts paid for material or for services are charged to such part of work as they contribute to, and those items are kept by field

(Testimony of Arthur P. Davis.)

inspection, by timekeepers and inspectors in the field, and reported in writing to the accountant officers in the project office. Their records are kept under accountants, or by accountants, I mean. Any question arising as to the proper charge, or proper item to charge any cost to, is ruled upon by the engineer in charge of the project, and when the work is completed the results of that accountant are stated in detailed accounts in the office, and with explanatory letters are sent to Washington.

Q. (Mr. Williamson) That is, to your office?

A. Yes, to my office in Washington. There they are carefully examined and checked over by other experts to see if they are correct, so far as shows on their face, and are approved if found correct.

Q. Was that procedure adopted in the case of the Weisberger contract, Mr. Davis?

MR. RICHARDS: Same objection.

A. It was.

Q. (The Court) In what way is this approval shown?

A. The approval—

Q. Your approval?

A. Is shown whenever they are gone—it is shown in writing.

THE COURT: I will sustain the objection, then.

MR. WILLIAMSON: I think, Your Honor, the fact the account has been presented to them in writing signed by Mr. Davis—I haven't any formal writing this writing has been approved by him, but I think

(Testimony of Arthur P. Davis.)

—I will ask for the original of that; that is only a copy (exhibiting paper to the Court).

THE COURT: That is signed by Mr. Davis, is it?

MR. CAIN: This is a copy, Your Honor, sent to Mr. Meigs.

MR. MEIGS: I never received a copy of any such instrument to my knowledge.

MR. WILLIAMSON: We want to introduce the original.

MR. RICHARDS: We object to it. It don't purport to have ever been sent to Mr. Weisberger, the defendant.

THE COURT: It wouldn't have to be sent any place. The only thing would be the evidence of the approval.

MR. RICHARDS: Yes, but if they have any such evidence as that they ought to have it in their own records. They might have sent it to some third party.

MR. WILLIAMSON: Of course, we can't keep the originals.

MR. RICHARDS: You could keep the original of a record like that. If that is the foundation of your proof you ought to.

THE COURT: If you prove the originals were delivered to the parties I will either require them to produce it or offer secondary evidence of its contents.

MR. RICHARDS: This don't purport to be signed by the Chief Engineer either, if the Court please.

(Testimony of Arthur P. Davis.)

MR. MEIGS: By the Acting Director. I think the Court will find that was signed by a man by the name of W. P. Murphy.

Q. (Mr. Williamson) Mr. Davis, have you gone over the account personally of Mr. Weisberger?

A. In a general way ,yes, sir.

Q. Have you approved the finding of the local office as audited in your office? First, was this account audited in your office prior to your going over it?

A. It was.

Q. Did you approve the finding of the local office as audited in your office?

MR. RICHARDS: Objected to as incompetent, irrelevant, immaterial and not the best of evidence.

Q. (The Court) What is the mode of approval of these accounts in your office; what course do you pursue?

A. Whenever it is necessary to send an account that account is examined by expert accountants. Their judgment is taken by the approving officer, as a rule. That is my method.

Q. How do you indicate your approval on the accounts?

A. By signing my name. I will say that sometimes I am not present and there is an Acting Chief Engineer who does that in my stead.

MR. WILLIAMSON: We can prove, Your Honor, this man knows these accounts and identifies them and

(Testimony of Arthur P. Davis.)

states he does approve them of this day under oath, and I think it is good documentary evidence.

MR. RICHARDS: Under his own statements he says he doesn't do it himself.

MR. WILLIAMSON: He says sometimes it is not done.

THE COURT: I wish they would pay more attention to contracts of this importance. If there is some statement of this in writing authorizing it I think you better produce it here.

MR. WILLIAMSON: The only way to do it is to get the officer.

THE COURT: A Judge signing a judgment is not the best proof of what that judgment contains, is he? I will admit the testimony for the present and determine its legal effect hereafter.

MR. RICHARDS: Exception to the ruling.

MR. WILLIAMSON: What was the last question.

Q. (Question repeated).

A. I did.

MR. RICHARDS: That goes under my objection, of course.

THE COURT: Yes.

Q. (Mr. Williamson) I hand you this document (exhibiting same to witness). I will ask you what that purports to be?

A. That purports to be——

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial, the same objection I made before.

(Testimony of Arthur P. Davis.)

THE COURT: It shows on its face what it purports to be, I presume.

A. Shall I answer the question?

Q. (The Court) State whether or not that is the statement you approved?

MR. RICHARDS: Same objection to that.

THE COURT: Yes.

A. That appears to be the account that I approved; yes, sir, it is.

Q. (Mr. Williamson) Is that a final statement approved by you?

MR. RICHARDS: Objected to as incompetent, irrelevant, immaterial and not the best evidence.

THE COURT: Objection overruled for the present.

MR. RICHARDS: Note an exception.

A. It is.

Q. (Mr. Williamson) I will hand you Plaintiff's Identification "4" (consisting of a number of papers). Are those documents I show you, Mr. Davis, copies of the documents which pertain to that final statement and were approved by you?

A. I don't see how I can answer that question without very carefully checking over.

Q. You have to check these through is all (showing).

THE COURT: Have you compared them yourself, Mr. Williamson?

MR. CAIN: Yes, we have compared them.

THE COURT: It is not necessary for the witness to take up the time of comparing them then.

(Testimony of Arthur P. Davis.)

Q. (Mr. Williamson) These are the documents you have examined the last few days?

A. Yes, sir.

Q. At that time did you find that correct?

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Same ruling.

A. Yes.

MR. WILLIAMSON: I offer them in evidence.

MR. RICHARDS: If the Court please, I object to the offer of these as incompetent, irrelevant and immaterial, and on the further ground there is no evidence here the witness knows anything about them of their contents, how they are made up, for what purpose they were made or by whom, or what was actually done in connection with the work of which they purport to be accounts, and that there is no evidence that that work and those expenditures were for the same work and for the same purpose as that embodied in the contract and plans and specifications entered into by Theodore Weisberger.

MR. WILLIAMSON: Matter of affirmative defense, Your Honor.

THE COURT: I understood the witness it is the completed contract on the part of the government.

MR. RICHARDS: Supposing it is the same——

THE COURT: I will overrule the objection.

Objection. Overruled. Exception.

Q. (Mr. Williamson) This account is the account

(Testimony of Arthur P. Davis.)

of work done under the Weisberger contract, is it not?

A. It is.

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial, the same objection as I made to the other.

THE COURT: Yes.

MR. RICHARDS: I don't know whether it is sufficiently in this objection, the objection that there is no proof that the account was ever actually approved by Mr. Davis. If it is not I would like to incorporate that.

THE COURT: Yes.

Q. (Mr. Williamson) I hand you Plaintiff's Exhibit "4" and will ask you to state to the jury the total cost of that work to the government.

MR. RICHARDS: Objected to as incompetent, irrelevant, immaterial and not the best——

THE COURT: He is simply reading what is in the paper.

MR. WILLIAMSON: Just to refresh his recollection.

THE COURT: Yes.

A. The total credit—the total cost to the United States was \$356,836.48.

Q. (Mr. Williamson) What was the cost of that work, the amount done at the prices bid by the contractor?

MR. RICHARDS: Same objection.

THE COURT: Overruled.

(Testimony of Arthur P. Davis.)

MR. RICHARDS: Exception.

A. \$305,735.43.

Q. (Mr. Williamson) What was the excess cost to the United States?

MR. RICHARDS: Same objection.

A. \$51,095.05.

Q. (Mr. Williamson) Do you know of your own knowledge that that was the excess cost to the United States?

A. I do not.

Q. Have you determined in the manner prescribed by your department that that was the excess cost to the United States?

MR. RICHARDS: That is objected to. He says he don't know.

THE COURT: I will sustain the objection.

Objection. Sustained. Exception.

Q. (Mr. Williamson) Did you determine as Chief Engineer the excess cost to the United States?

MR. RICHARDS: That is objected to.

THE COURT: He can answer that question yes or no.

A. I did.

Q. (Mr. Williamson) Is the figure named by you, the figure determined by you the excess cost?

MR. RICHARDS: Objected to as incompetent, irrelevant, immaterial and not proper evidence.

THE COURT: I don't see how he can answer that question with the negative answer given before.

(Testimony of Arthur P. Davis.)

MR. WILLIAMSON: I think he made the wrong answer before.

A. Can I explain the answer?

THE COURT: You can explain your last answer.

A. When I said I did not know of my own knowledge the excess cost I meant that I had to depend upon others for a portion of that knowledge, and that is the method.

MR. RICHARDS: I don't see that helps it. There is plenty of evidence in this country as to what was done out there.

MR. WILLIAMSON: Let me ask the witness one more question.

Q. Were the men who conducted the work, who made the expenditures and who made the account that you approved, acting under your direction?

A. They were.

MR. RICHARDS: I want the same objection to that question.

THE COURT: Objection overruled.

Objection. Overruled. Exception.

Q. (Mr. Williamson) They were employes of the United States government?

A. They were.

Q. Acting under your direction?

A. They were.

MR. WILLIAMSON: Your Honor, I think this should be allowed. It is shown these men were employes of the United States government, and it is

(Testimony of Arthur P. Davis.)

presumed the employes of the government will act rightfully and in accordance with their duties.

THE COURT: He says he approved this account as rendered. It shows there is an excess of expenditure.

MR. WILLIAMSON: But you ruled out the question which was very material.

THE COURT: What was that?

MR. WILLIAMSON: Read the question. (Former question read).

THE COURT: I don't know what light that would throw on it. He has testified to what he has done all the way through as far as that is concerned, went over the accounts and approved **them**.

A. Well, Your Honor, if you will permit me to explain a moment. I don't want any misconception of what I meant. Perhaps I don't understand the question as the Court does that was put a while ago, but if the question as to whether I know of my own knowledge means that I made these purchases and paid out the money myself, and kept the accounts myself, and did all the work, did all the timekeeping myself—that is what I mean by saying I didn't know of my own knowledge, but I think I am justified in saying, I know I am justified in saying that I know it as well as is practicable within the meaning of the contract, that is, I know the character of the account, know the character of the work they did and how they did it and it was done in accordance with the directions of the government.

(Testimony of Arthur P. Davis.)

MR. RICHARDS: I move to strike this statement volunteered by the witness.

THE COURT: I sustain the motion.

MR. WILLIAMSON: No objection to that.

Q. I believe you testified that you had, as Chief Engineer of the Reclamation Service, approved this account?

MR. RICHARDS: I object to that, if the Court please, as a repetition, incompetent, irrelevant and immaterial.

THE COURT: I understood him to so testify.

A. I did.

MR. WILLIAMSON: That is all.

MR. RICHARDS: I move to strike all the testimony given by this witness on the ground it is incompetent, irrelevant and immaterial. It doesn't prove that the government expended any money in the completion of the contract entered into by Mr. Weisberger. The evidence shows he has no knowledge of the actual transactions themselves, and that the accounts were never audited and approved by him in the manner specified in the contract.

THE COURT: I am under the impression the proof is a little lame on the point that the work covered by these accounts was the work left undone under the contract at the time of the suspension. I think the proof is a little lame on that.

MR. WILLIAMSON: Well, Mr. Davis, as I recall it, stated definitely the contractor did not complete the work and that it was completed by the

(Testimony of Arthur P. Davis.)

government. The accounts themselves show exactly how much was done and how much was not done.

THE COURT: You can ask him whether there was any work done outside of the contract and that will settle the matter.

Q. (Mr. Williamson) In completing this work, Mr. Davis, was any work done by the United States upon the Schedule 6A and 7A of that contract, covered by that contract not provided for in the contract? I am not asking you to give a legal interpretation of the contract now, but was any work done by the Reclamation Service not covered by the contract?

A. No work done by the Reclamation Service included in this account, in these accounts?

Q. In the completion of that work?

A. No work done by the United States which is included in these accounts was outside of the contract.

Q. That was the next question I was to ask. Do these contracts cover any work other than that called for in the contract?

MR. RICHARDS: Do what cover?

MR. WILLIAMSON: Do these accounts cover any work not called for in the Weisberger contract?

MR. RICHARDS: This is objected to unless he shows that he knows.

THE COURT: You can answer if you know.

A. They do not.

Q. (Mr. Williamson) Your answer that they do not cover work——

(Testimony of Arthur P. Davis.)

A. Do not cover any work outside of the Weisberger contract.

MR. WILLIAMSON: That is all.

CROSS EXAMINATION.

Q. (Mr. Richards) Now, Mr. Davis, you testified in regard to the contract, what Mr. Weisberger's contract was in regard to lining this morning. The portion of the canal that you have reference to is that shown on drawing No. 2 of the contract, is it not?

A. It is.

Q. Now, will you look at the map behind you and see if it is substantially a reproduction of this drawing on a larger scale?

A. Only in a very general way. There are a very great many things on this map that are not there (showing) and a great many things there that are not here.

Q. It shows the general outline of the canal, though, does it not?

A. It appears to.

Q. Now, in the contract that Mr. Weisberger had what was the work that he was to perform in connection with the construction of that canal?

A. The manufacture of shapes and placing them.

Q. Placing them in the canal?

A. In the canal and in the tunnel.

Q. I show you Defendant's Identification "A" and ask you if that is the blueprint drawing of the shapes that he was to manufacture (exhibiting same to witness).

(Testimony of Arthur P. Davis.)

A. There are so many details about that that I can't say positively in all particulars. That looks very much like it.

Q. Could you tell by comparing it with the details of that on the contract? It is substantially the exact copy on a larger scale, isn't it, of drawing No. 8A?

A. Well, I would have to check all the dimensions, of course, to answer that positively, but it appears to be. Well, I notice one difference.

Q. Well, if it is not shown it is a government blueprint we will use this (showing).

A. You didn't ask that question. I don't know whether it is or not.

Q. I thought if we could use those——

A. I see no objection to using these. If there is any difference it will probably develop. I don't know of any material difference; don't see any.

Q. Now then, the shapes that he was to put in the open canal were substantially like these shapes on the left of this blueprint, were they not? These were the shapes with which the open canal was to be lined (showing)?

A. Well, this is a standard open canal, that is a flume (showing).

Q. That is the standard canal shape (showing)?

A. Yes.

Q. And this is—— (showing)

A. The tunnel shape.

Q. Now, in this detail of joint as it is shown here what does that show (showing)?

(Testimony of Arthur P. Davis.)

A. That shows—this is simply a broken joint and continues on; shows bevel there, which was later to be filled with cement to seal up the joint (showing).

Q. Now, I will ask you to look at this concrete shape here (showing) and ask you if that is substantially the way that joint was designed in the original specifications?

A. It is in shape. I would have to measure it to get it exact, but I think that is correct.

Q. You think that is a correct representation?

A. Yes, substantially so.

MR. RICHARDS: I suppose those ought to be identified in some way. Mark these for identification, will you? (Same being marked Defendant's Identification "B" and "BB" and "C" and "CC".)

Q. I show you this Identification "D" and ask you if that is a blue print detail of part of this work?

A. By that do you mean as to whether this was furnished by the government?

Q. Yes, and whether it is substantially——

MR. WILLIAMSON: I don't see the materiality of this evidence. Any drawings referred to in the contract I think are material.

MR. RICHARDS: These are blue print copies of these drawings. This is simply to get them on a scale so the jury can see them. They are blue prints that were furnished Mr. Weisberger for the construction copied from these drawings. That is true, is it not, Mr. Weisberger?

MR. WEISBERGER: Yes.

(Testimony of Arthur P. Davis.)

MR. WILLIAMSON: Well, we don't know anything about that.

MR. RICHARDS: I am asking Mr. Davis if they are substantially the same.

A. As I said, I would have to check them over pretty carefully to find out. The general shape—all these shapes, of course, is easy to—

THE COURT: If there are any discrepancies between the two it will probably develop during the trial.

Q. (Mr. Richards) You would identify that, would you, (showing) as substantially at least a copy of Drawing No. 11A?

A. It appears to be substantially a copy of it.

Q. I show you Defendant's Identification "E" and ask you if that is a blue print, substantially a copy of Drawing No. 9A?

A. That was a detail drawing and it would be quite a job to check them, but apparently they are substantially the same.

Q. I call your attention, Mr. Davis, to the drawing attached to the contract as Drawing No. 5B and ask you what that is?

A. That is a profile of the canal line, main canal.

Q. That shows the construction of the—the outline of the canal?

A. The profile, yes.

Q. Now will you indicate on this map here (showing) what the points are—start at the beginning and show the open flume connections, the tunnel sections—or the open canal sections, the tunnel sections and the

(Testimony of Arthur P. Davis.)

flume sections on this map as shown by that detail?

A. There is no scale marked on that map, but it looks substantially correct, or that part that is marked there (showing) corresponds to the unlined portion here (showing), and the lateral portion begins right below it, runs—the line of the canal—down to the tunnel. This line (showing) seems to correspond with that (showing), but I can't tell because the distance is not marked on there as I can see.

Q. This part up at the head here (showing), the unlined canal, and this part, Steeple Tunnel Canal, was to be lined with shapes (showing)?

A. Yes.

Q. (The Court) What is the distance here as shown on your map (showing)?

A. With the Steeple Tunnel—from the head to the Steeple Tunnel is about—it is about 126 stations or twelve thousand six hundred feet.

Q. (Mr. Richards) Will you just mark that on there, please, just what you say it is?

A. Well, it is not exactly; I haven't the scale to mark it by.

Q. I want it so the jury can get an outline. They can't see this little map. (Witness puts figures on large map). And how long was this Steeple Tunnel that is shown by the profile?

A. I need a scale.

Q. You can't tell?

A. No. The figures are so fine I can't read them.

Q. Aren't the distances scaled on that profile?

(Testimony of Arthur P. Davis.)

MR. WEISBERGER: Yes.

A. If I had a scale I could get this.

Q. (The Court) Can you estimate it?

A. Yes, I can estimate it. I guess that is about four hundred and fifty feet, something like that.

Q. (Mr. Richards) That is the length of that tunnel?

A. Yes. No, I didn't mean that.—Yes.

Q. Will you mark that on that other one, if you are perfectly satisfied that is what it is?

A. That is a little long. It may be in the neighborhood of four hundred feet. The distance—every ten foot station is marked, but to get the distance between have to be scaled.

Q. What is substantially the distance from this tunnel (showing) to the next tunnel?

A. About thirteen thousand feet.

Q. Will you just mark that on there (witness marks figures on large map). That is the distance——

A. From the Steeple Tunnel to the Trail Creek.

Q. How long is Trail Creek Tunnel ?

A. Thirty-three hundred feet approximately.

Q. Will you just mark that on there (witness marks figures on large map). How far is it from that to the next—what is the next tunnel there—Trail Creek to Log Slide tunnel?

A. Fifty-five hundred feet is what I make it.

Q. Mark that on there, please (witness marks figures on large map). What is the next tunnel?

A. After Log Slide Tunnel?

(Testimony of Arthur P. Davis.)

Q. That brings you to Log Slide tunnel How long is Log Slide?

THE COURT: I would suggest we might save time by having the witness mark these distances some time when the court is not in session.

A. About a thousand feet or little over.

MR. RICHARDS: Just mark that (witness marks figures on large map).

Q. Does this detail also show where the flumes were to go and what the length of them is?

A. Yes, sir.

Q. Will you mark on there where there would be flumes?

A. That also is going to take a good deal of time because there is no figures on there by which these distances can be identified.

Q. Well, tell me, then, from this map (showing) what the distances of the different flumes are, the length of them, provided there is?

A. One flume is thirty feet, the next one thirty feet, and the next is thirty feet, the next is forty-five feet, the next is ninety feet, the next is thirty feet, the next is ninety feet, the next is seventy-five feet, the next is thirty, the next is thirty, the next is forty-five, the next is thirty, the next is seventy-five, the next is ninety, the next is sixty, the next is ninety, and that, I believe, is all.

Q. It was for these flumes that the shapes and supports shown on Defendant's Identification "d" were intended, was it not?

(Testimony of Arthur P. Davis.)

A. Yes, sir.

Q. That was to make the flumes?

A. Yes.

Q. What was the tunnel to be lined with, Mr. Davis?

A. Circular shapes.

Q. That was such shapes as these on the right hand corner of Identification "A"?

A. Yes, sir.

Q. You remember, Mr. Davis, what the estimated number of pieces of open canal lining and flume lining were specified in the contract?

A. No, sir.

Q. Do you know what portion of that canal was lined with open—with the shapes for open canal lining?

A. In a general way. I don't know the exact number of feet.

Q. You can't give the exact number of feet?

A. No.

Q. How near can you give it, Mr. Davis?

A. I can't give it approximately.

Q. You can't even give it approximately?

A. I can find it by looking at the contract.

Q. The contract shows how many there should have been, but I want to know how many were used.

A. The number of feet you asked.

Q. Do you know how many open canal shapes were used?

A. No.

(Testimony of Arthur P. Davis.)

Q. Do you know how many tunnel shapes were used? how many of the round shapes?

A. I could figure up.

Q. Do you know how many of these flumes were made?

A. No.

Q. Were any of them?

A. Some flumes were made, yes.

Q. The government, when it completed this contract, did construct some flumes?

A. Yes, sir.

Q. Of concrete?

A. I think so.

Q. And they made flume supports?

A. They made some supports, I think.

Q. And the different structures for those flumes?

A. I think so.

Q. Do you know where those flumes were placed?

A. I can't tell you in detail where they were placed. no, sir. I don't remember. I went over the line and looked it over, but I don't remember the details.

Q. You don't remember how many there were of them?

A. No.

Q. Do you know whether there were any changes made in any of the tunnels?

A. I do.

Q. Which one?

A. You mean the lining in the contract ?

Q. Yes.

(Testimony of Arthur P. Davis.)

A. There was a change made in the Trail Creek Tunnel.

Q. What sort of a change was that?

A. It was a change by which the tunnel was lined in what we call monolithic form instead of the shapes.

Q. That tunnel was how long?

A. About thirty-three hundred feet approximately, I think.

Q. Then instead of lining that with the shapes provided for in the contract that was lined solid or monolithic, as you call it, placed in the canal?

A. Yes, sir.

MR. CAIN: I think that is getting outside of the cross examination.

MR. RICHARDS: I don't think so. He went into the construction of the canal and what was done.

THE COURT: You may proceed.

Q. (Mr. Richards) Now, was there any tunnel that was shown on the original plans and this detail that you have been testifying from that wasn't constructed at all?

A. That I don't know.

Q. You don't know whether there was or not?

A. No.

Q. When did you examine the work after it was completed up there, Mr. Davis?

A. I don't remember the date.

Q. You didn't compare it, then, and see whether all of the tunnels that were contained in the original specifications were constructed or not?

(Testimony of Arthur P. Davis.)

A. No.

Q. You don't know whether any of them were left out or not?

A. I do not.

Q. Do you know how that is shown on that map and shown on the drawings attached to the contract called Log Slide tunnel was constructed?

A. How it was constructed?

Q. Yes.

A. What do you mean by that?

Q. Well, I asked you how it was constructed.

A. Well, they blasted the rock out and dug it out and lined it with concrete.

Q. Do you know as a matter of fact whether it was ever built or not?

A. I don't positively.

Q. You don't know positively whether they made an open canal in constructing Log Slide tunnel?

A. No?

Q. Do you know?

A. I do.

Q. You think they made it an open canal?

A. No, I think they constructed tunnel.

Q. The whole of it?

A. They probably changed the length some, but I think my answer is sufficient.

Q. Were any of the other small tunnels further down changed that you know of?

A. Not that I know of.

(Testimony of Arthur P. Davis.)

Q. You don't know whether they were or not?

A. No.

Q. Now, you say the joint here as made by Defendant's Exhibit "B" is substantially the way the lining was designed to be jointed in the contract?

A. Substantially, yes.

Q. And in the specifications what was the width of that joint to be, you remember?

A. What do you mean by the width?

Q. That is here (showing), how much space the joint was to leave?

A. No, I don't remember. The contract will tell you.

Q. Well, will you refer to the specification on that and tell the jury?

A. You might find it and get it more quickly than if I do it. (Witness refers to papers) That opening was to be three-eighths of an inch at the outside and seven-sixteenths at the maximum, coming to a point at the bottom—three-eighths here, allowing seven-sixteenths at that point (showing), and coming approximately together at the bottom, at the bottom of the "V", I mean.

Q. The shapes, then, were placed to set tight?

A. Well,—

Q. Except for that (showing)?

A. Not absolutely; tight as feasible.

Q. Do you know how much allowance was made for that joint there (showing) in the construction by

(Testimony of Arthur P. Davis.)

the inspectors, how near they required them to be brought together?

A. I inspected a great many, but I don't know the distance; I don't remember the measurements made on them.

Q. Now, as a matter of fact, when the government took over this work and constructed this canal did it make the joints like that (showing)?

A. No, sir, not many of them; they made a few.

Q. Do you know how many?

A. No, I do not.

Q. What change did they make?

A. They made a more open joint and filled it with concrete.

Q. Allowing how much space?

A. The space allowed varied. It fit approximately together in places and wider at other places.

Q. Do you know what the variation was?

A. No. It was considerable, several inches.

Q. The space that was allowed between these (showing)?

A. Yes.

Q. And also there was a change in the manner in which the end of the shape was constructed, was there not?

A. You mean by that——

Q. Instead of laying the smooth end with this solid wall on this edge (showing) they put a groove in the center, did they not?

A. I believe so, yes, sir.

(Testimony of Arthur P. Davis.)

Q. And do you know how they filled those joints?

A. Filled them with concrete.

Q. Well, did they make the shapes and the joints and take them up and place them or did they put the joints in——

A. Put the joints in after the shapes were placed.

Q. That is, they would manufacture these shapes and place them in the canal and go along and fill the joint with the concrete, that made up the joint (showing)?

A. That is right.

Q. Would these pieces of concrete, Defendant's Identification "F", be substantially the way one of those joints were constructed that were made separate?

A. I don't think so. Perhaps I don't know the purpose of your question, but it is not the way that would be constructed.

Q. What is the difference?

A. This (showing) is warped and they would—this face here (showing) would be normal to the joint and parallel with the face of the——

Q. Was this the general shape of it, the space left between two particular joints; that would be about what it would take to fill it (showing)?

A. Yes. This would be the shape the two joints would take (showing). That didn't fit very well.

Q. That is substantially the amount of concrete it would take to fill one of those joints placed at that distance?

A. Yes, that is right.

(Testimony of Arthur P. Davis.)

Q. I show you this Identification "G" and ask you if that would be substantially the amount of concrete it would take to fill one of the joints as originally planned?

A. Oh, that might perhaps be an average, yes.

Q. Why did they change the manner of jointing those shapes, Mr. Davis?

A. There are two reasons—three reasons. One was that by means of an allowed variation they could more easily take curves with this form (showing). And another is that by allowing a wider opening, to be afterwards filled with concrete, the work was cheapened, because the placing could be done more rapidly and need not be quite so carefully done. It was done for the purpose of cheapening the work. Those two reasons are entirely means of cheapening the work. The third reason was, as illustrated by this piece that you have here (showing), when two shapes were not in exact alignment the difference was taken up on a gradual slope here (showing) instead of a sudden offset between the two joining shapes.

Q. That was the real purpose in making the change, wasn't it, to overcome this shoulder that would ordinarily result here from this closed joint (showing)?

A. That is one of the reasons; that is one of three reasons.

Q. They found that when they came to set up these shapes they came so close together that they

(Testimony of Arthur P. Davis.)

wouldn't fit exactly and it would make an offset, was that not a fact?

A. Would not fit exactly unless they fit exactly.

Q. But in moulding them it was difficult to make them fit.

A. Not in moulding them. It was in placing them in the canal where the trouble was.

Q. That was one of the reasons why this change was made, so as to give a larger area to make a slope there (showing) to overcome that—

A. No, it was for the purpose of cheapening. The contractor was required to make a good joint there, and it could be done acceptably by beveling off this edge (showing), but that is accomplished by the other method of joint, and that other method of joint had the other two advantages of cheapening the work, one by easing the curves, that is, by allowing that width on the inside of the curve. The shapes could be set close together and on the outside further apart, something like that (showing), and that is what was done so the curve could be taken with the same shape of joint.

Q. Do you know whether Mr. Weisberger ever applied for permission to make a change in the manner of jointing those shapes?

A. He may have done so. I don't remember about that. Other witnesses can doubtless give that information.

Q. You don't recollect of his having an application pending for that purpose?

(Testimony of Arthur P. Davis.)

A. For just what purpose?

Q. For the purpose of a change in the manner of manufacturing and joining the shapes?

A. I don't recall it, but I can't say that he did not right now. It is a good while ago.

Q. Do you know whether there had ever been any extension on the time of completion granted Mr. Weisberger?

A. There had been.

Q. Do you know when that was given?

A. I don't remember the date.

THE COURT: It is shown, I think, by one of the papers in evidence.

MR. WILLIAMSON: We intended to show that. We will stipulate now that notice can go in as their or our exhibit.

THE COURT: I think the extension was shown in the report of Mr. Conway. I may be in error, but my recollection is when I glanced over it I saw that.

Q. (Mr. Richards) There are the extensions (exhibiting paper to witness.)

A. Extended October 23, 1907, to August 1st, 1908, on Schedule 6A and September 23rd to October 15th on Schedule 7A.

Q. I show you Defendant's Identification "H" and ask you if that is your signature attached to that?

A. That is.

Q. Now, do you know whether or not, after this extension had been made and while it was in force, Mr. Weisberger made an application to the Depart-

(Testimony of Arthur P. Davis.)

ment for leave to change the manner of jointing those shapes? Don't you know, Mr. Davis?

A. I don't now remember.

Q. Wasn't that ever brought to your attention?

A. It may have been. I don't say it wasn't brought to my attention, but there are twenty-seven government projects and I haven't all the particulars in regard to all of them. If it were done it probably did come to my attention.

Q. You don't remember, then, whether he had any application for change pending at all or not?

A. Oh, no, I didn't say that.

Q. Well, did he have an application for change?

A. Oh, he made many applications for changes of a radical nature.

Q. Do you know when he made the last one?

A. I don't remember the date. I remember that there was a change—some requests for changes pending at the time the contract, or at the time the suspension of the contract was under consideration.

Q. He had an application for change pending at the time of the suspension or alleged suspension of the contract?

A. Yes.

Q. Now, in the method of joining these shapes, Mr. Davis, what was the small joint as originally designed to be filled with?

A. Mortar.

MR. CAIN: I don't see the materiality of that, Your Honor, on cross examination.

(Testimony of Arthur P. Davis.)

THE COURT: I am under the impression that we are reversing the order of proof here, according to the rules laid down by the Supreme Court of the United States in a number of cases. The Court has held distinctly that where a matter is referred to the judgment of an officer and his decision is shown that the burden of proof was on the defendant to impeach that decision.

MR. RICHARDS: That is true in some cases, but in this kind of case where the government is seeking to recover from the defendant for excess cost which it claims that it has expended in completing the defendant's contract, the burden is on the government to show a failure to comply with the contract and to show that the government did, as a matter of fact, complete the contract, and complete the same contract that he had. Now, if they are going to prove that they are entitled to recover from Mr. Weisberger here on account of excess they must show that that excess was expended in completing the contract that he made, not in doing something else.

THE COURT: If they have shown the proof required by the contract they have shown that prima facie, and that will prevail until you overturn it.

(Argument by counsel)

MR. RICHARDS: Here is another thing that might be questioned, if they hadn't gone into it themselves, but they opened this by asking him what was done. They opened the question of the perform-

(Testimony of Arthur P. Davis.)

ance of the contract and the work that was done under it themselves. I noticed that at the time.

THE COURT: Well, it was because you insisted they should. I think that under the authorities I am compelled to hold as long as the contract is shown and the suspension by the Secretary of the Interior, an auditing of the accounts by the Supervising Engineer, that the plaintiff has made a *prima facie* case, and the burden is on the defendant by both allegation and proof to overturn it.

MR. RICHARDS: I don't understand the rule to go that far. Of course, if that is Your Honor's ruling there is no use taking up the time.

THE COURT: It is almost adjourning hour now and we will adjourn until 9:30 in the morning and I will announce my decision definitely at that time, but that is my understanding of the authorities. I have construed this question several times. I limit myself almost entirely to the decisions of the Supreme Court of the United States on questions like that. There are one or two cases where an opinion delivered by Justice Harris says the very purpose of the stipulation was to settle the case without a lawsuit.

Whereupon adjournment was taken until February 20, 1912, at 9:30 o'clock a. m.

North Yakima, Washington,
Feb. 20, 1912, 9:30 o'clock a. m.

(Continued argument by counsel)

THE COURT: The testimony of the witness as to what the government did under the contract was prac-

(Testimony of Arthur P. Davis.)

tically a re-iteration of the terms of the contract itself. The government did not attempt to prove an open account against this man, because he had no personal knowledge of the matters, he simply acted on reports from other officers. The government has no greater right here than other persons, but these persons entered into a contract and it is the duty of the Court to enforce that contract.

In the case of *United States vs. Nelson* a similar contract was entered into with the chief engineers of the army and the chief engineers refused to grant an extension and the parties went into a Court of Claims. The Court of Claims undertook to revise the action of the engineers in refusing an extension of time and the decision was reversed by the Supreme Court of the United States. By doing so it laid down certain elementary principles of law which must control in this case. (quoting from said case). And again the Court explicitly decides the burden of proof is upon the party challenging the action of the officer by both allegation and proof to show the fraud or the bad faith. For those reasons I hold the government has made out a *prima facie* case, and there was nothing in the direct examination which authorizes that the defendant could go into the defense at this time. The objection of further cross examination on that line will therefore be sustained.

MR. RICHARDS: Note an exception.

MR. MEIGS: An exception is taken as to both defendants.

(Testimony of Arthur P. Davis.)

THE COURT: Yes.

MR. CAIN: The government rests, Your Honor.

MR. RICHARDS: If the Court please, at this time the defendants move that the action of the plaintiff herein be dismissed and judgment of nonsuit entered for the reason that the plaintiff has failed to prove a sufficient case to go to the jury, and that the evidence introduced is insufficient to sustain a verdict or judgment against the defendant on the cause of action sued on herein; the plaintiff has failed to introduce any evidence to establish its right to suspend the contract sued on herein, and has failed to prove that the contract was ever suspended in the proper manner, or that any action in the premises was taken by the Secretary of the Interior; that no notice of this suspension was ever served upon the defendant emanating from the Secretary of the Interior, or from any officer having authority to suspend the contract or give notice of such suspension. The contract shows that at the time of the attempted suspension the contract had been extended by the Secretary of the Interior and that there was ample time within which the defendant could have completed the contract had not the arbitrary action been taken by the officers in suspending and removing him therefrom. The government has failed to show that the work which it claims to have done is the same work that was called for in the contract entered into by the defendant, and has failed to prove what work it did or what moneys it expended, or what the excess cost of any work that it may have done is over and above

(Testimony of Arthur P. Davis.)

the price that was to be paid the defendant for the performance of the work under his contract. There is no evidence that the Secretary of the Interior exercised his judgment in regard to this matter or performed the functions which were delegated to him by the contract and under the law in relation to the suspension of a contract of this character. The government has failed to prove the performance of the contract on its part and the performance of the things which it was to do before the contractor under the contract had to perform; that having failed to show that it had performed on its part it had no right to suspend the contract nor to undertake to hold the defendant herein. There is no proof here that the government has expended any moneys which have not been re-imbursed to it, or that the money which it claims to have expended has not been paid.

(Argument by counsel).

THE COURT: You are asking me to hold the Secretary of the Interior was acting in fraud when there is no evidence for me to hold that. I have already held that the correspondence they have offered here is no evidence against your clients here at all, it is merely a recital of an officer, and I did not intend it to go before the jury. The letter extending the time is in evidence.

(Continued argument by counsel).

THE COURT: The Secretary of the Interior has suspended this contract, that is an established fact in this case, but I will hold as a matter of law it was

(Testimony of Arthur P. Davis.)

a suspension of the contract, and his decision cannot be overcome except by proof that he was guilty of fraud, either express or implied. The same is true of the decision of the engineer in auditing the accounts. If they are not given that effect that are not given any effect at all, so for reasons already stated I hold the burden of proof is upon you to show the order of suspension was unauthorized and the accounts are not correct. The motion denied.

Motion. Denied. Exception.

MR. RICHARDS: Now, if the Court please, in view of that ruling I think it will be necessary for us to enlarge the language of one paragraph of our complaint, in which we allege that they did wrongfully take possession of the property, and set forth a little more fully that the acts of the officers were arbitrary, unwarranted and so forth.

THE COURT: I haven't examined the answer. I suppose there will be no objection to that.

MR. RICHARDS: It wouldn't involve any new issues, simply be an enlargement of the matter—

MR. CAIN: To which paragraph do you refer?

THE COURT: Are both answers the same?

MR. MEIGS: No, Your Honor, the answer of the Surety Company is somewhat different than that of the defendant Weisberger. I think that my provisions of my answer are a little broader perhaps than that of Mr. Richards', yet I would want the same right, the right to amend paragraph four, or elaborate it, by setting out the action of the Secretary was—

(Testimony of D. C. Henny.)

MR. RICHARDS: It is in paragraph nine of the second affirmative defense. Perhaps it would be more proper to put in an additional paragraph in that defense than the change in the one already in there. We would ask leave to prepare that amendment at noon, if that is satisfactory. It would either come in as part of paragraph nine or else as an additional paragraph between nine and ten there, alleging they acted arbitrarily in suspending the contract.

D. C. HENNY, produced as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. Richards). State your name, Mr. Henny.

A. D. C. Henny.

Q. What is your occupation?

A. Consulting Engineer.

Q. In whose employ are you?

A. I am in private practice.

Q. Have you been connected with the government reclamation service?

A. Yes, I am doing now considerable work as consulting engineer for the service.

Q. Were you connected with the government reclamation service at the time it was constructing the Tieton Canal?

A. I was.

Q. When did your connection first begin with them?

A. In 1904, if I am not mistaken.

(Testimony of D. C. Henny.)

Q. And how long did it continue?

A. I was in the employ of the service for six years on an annual basis of salary, and after the expiration of the six years I have been doing work for the service in the capacity I stated, as consulting engineer.

Q. What was your title when you were regularly in the service in connection with the Tieton Canal?

A. The last year of my service I was consulting engineer, but for five years previous as supervising engineer.

Q. And you were in touch with the work on that canal practically from the beginning to its finish, were you not?

A. Yes.

Q. Now, Mr. Henny, were you present at a conference held about the time or shortly after the canal was completed, when the fifty-one thousand and some dollars which the government is suing Mr. Weisberger for here was charged up—it was agreed it should be charged up and it was charged up against the Tieton Project and the water users?

A. No, sir.

Q. Were you not present at that meeting?

A. Not that I recall.

Q. Was there such a conference held?

A. I do not know positively.

MR. RICHARDS: That is all.

MR. CAIN: If the Court please, for the purpose of offsetting the question now—we might just as well

(Testimony of D. C. Henny.)

do it now as any time—I would like to interpose an objection to the question if he was present at a conference when this was charged up to the water users of the Tieton project. I assume you are going to attempt to prove that.

MR. RICHARDS: My very purpose of putting this testimony in this order was to raise that.

MR. CAIN: We might just as well settle that question now as any time. We take the position that notwithstanding the fact that that may have been charged up to the Tieton Water Users' Association, yet that the government is obligated—they agreed to turn this over to the Water Users' Association at a certain price. They are obligated to construct this as cheaply as possible, and if there is an excess cost, why, the government is bound to collect that, and the fact that the cost of constructing this canal is going to be paid for by the Water Users' Association does not relieve Mr. Weisberger from the obligations of this contract.

MR. RICHARDS: I don't know whether the Court has examined the first affirmative defense we have set up here in this answer?

THE COURT: I think I glanced over it the other day. It sets up substantially it was charged against the Water Users' Association, and so forth.

MR. RICHARDS: It sets up the contract between that association and the government, whereby the association agree to do certain things; that the corporation was formed under the direction of the gov-

(Testimony of D. C. Henny.)

ernment for the purpose of repaying the land owners under this project, and that after the cost was determined, as to what the canal was going to cost, that then the amount was apportioned and was charged to the Tieton Water Users' Association and the persons who owned land and obtained water under that project through that association; and that the answer further alleges that when that was so charged it was secured by the agreement of the association and of the land owners to pay for those water rights, and that it is secured by what amounts to a mortgage on all the land in the Tieton project, and that the government has already collected from some of the owners a portion of this cost, and included in that money which they are collecting from the land owners is that fifty-one thousand dollars which they are seeking to recover from Mr. Weisberger in this case, and we allege that under that state of affairs the government is not a real party in interest in that money, that they having charged it to the Water Users' Association, and having included it in the contract which they are making with the land owners, seeking recovery and holding a lien for it, and already having collected part of the money, that they are not the proper parties to recover in this action, but if there is any cause of action against Mr. Weisberger it belongs to the Tieton Water Users' Association.

THE COURT: The case is very similar to the ordinary one where a municipal corporation makes public improvements at the expense of the abutting

(Testimony of D. C. Henny.)

property owners. It always necessitates the expense against the property owners, but that does not relieve the party contracting with the city for his obligations. I will sustain the objection to the proof along that line of defense.

MR. RICHARDS: The sustaining of that objection, then, would go to the whole line of proof under that first affirmative defense?

THE COURT: If that is the only thing embodied in the defense, yes.

MR. RICHARDS: That is all, that the government has already charged and collected part of this money from the Water Users' Association.

THE COURT: I will withdraw that defense from the consideration of the jury and allow you an exception.

MR. RICHARDS: I will ask Mr. Henny—

THE COURT: You better make an offer of proof, because this witness doesn't know anything about it. You may offer proof generally as to the affirmative defense.

MR. RICHARDS: The defendants at this time offer to prove that at the—

THE COURT: Just the general facts set forth in the affirmative defense.

MR. RICHARDS: (Continuing)—that at the time the plaintiff entered upon the construction of the Tieton project, the time the United States entered upon the construction of the project, it caused to be organized a corporation known as the Tieton Water

(Testimony of D. C. Henny.)

Users' Association, into which all of the parties holding lands under that project became members and took stock and entered into agreements that each share of stock represented a water right for one acre of land; that originally the price was fixed at \$60.00 per acre for the water and the stock was apportioned accordingly; that subsequently it was determined that the estimate was too low and the final determined amount was \$93.00 per acre, and the association increased its capital stock to an amount sufficient to cover the increased cost, making a total capitalization of three million one hundred sixty-two thousand dollars, divided into thirty-four thousand shares; that all of this stock was subscribed by land owners under the project; that they all entered into contracts with the association and with the government whereby they agreed to take water rights for the lands that they had, and that the amount of \$93.00 per acre, payable in ten annual installments, should be a lien upon their land for the payment of that water right which the United States government could enforce, either directly or through the Tieton Water Users' Association; that after this association was formed and the agreements entered into as above set forth the total cost of the construction of the Tieton canal was charged against this association and the land owners under it, and there was included in that charge the fifty-one thousand ninety-five dollars and five cents which Weisberger is sued for herein; that this amount is included in the lien which the government holds

(Testimony of D. C. Henny.)

upon the land of these water users and, by its agreement with the association and with the government, has already collected from a good many of the land owners a portion of this fifty-one thousand dollars which it is now seeking to recover from Mr. Weisberger.

MR. CAIN: Of course, we object to that.

THE COURT: There might be some misunderstanding about the last part of the offer, has collected a part of the \$93.00 an acre.

MR. RICHARDS: Collected from a portion of the land owners a part of the \$93.00 per acre, included in the sum on which that is based is the fifty-one thousand dollars which they are seeking to recover from Mr. Weisberger.

THE COURT: The objection will be sustained.

MR. RICHARDS : Exception.

MR. MEIGS: Exception.

Q. (Mr. Richards) Mr. Henney, were you familiar with this contract of Mr. Weisberger at the time it was first entered into?

A. I was.

Q. Were you supervising engineer at that time?

A. Yes.

Q. You also knew about it at the time it was extended in the fall of 1907, did you?

A. Yes.

Q. Would it have been possible for Mr. Weisberger, or for any one, to have completed that contract in the time that was given by that extension?

(Testimony of D. C. Henny.)

A. Before answering this question will you kindly tell me to what date the extension had been granted?

Q. The extension had been granted to August 1st—I may give you the letter.

THE COURT: The date is correctly stated in that memorandum, Mr. Richards.

MR. RICHARDS: That is the order of extension (giving letter to witness).

MR. WILLIAMSON: We object to that question, Your Honor, on the ground it is immaterial and incompetent.

THE COURT: A preliminary question, I presume. You may answer it.

A. I do not think that Mr. Weisberger, with the plant he had in the canyon, could have finished the work on that date.

Q. (Mr. Richards) But if he had had an additional plant, or by additional force, could he have finished it?

A. That depends on when he had put that additional plant in operation.

Q. But my question is, was it possible or could that contract have been completed within that time with sufficient force and sufficient plant in that length of time given there, presuming he would put in a sufficient plant and sufficient force?

A. That question is not entirely clear to me because it depends when he would have put that additional plant in.

(Testimony of D. C. Henny.)

Q. Well, presuming that he put it in in the spring, or whenever the time was ripe for putting it in?

A. If he had put that additional plant in at the time that this extension was granted I believe it would have been possible for him to have finished it.

Q. There was time enough given in the extension?

A. I think there was.

THE COURT: That extension was granted what date, Mr. Richards?

MR. RICHARDS: 23rd of October—

THE COURT: What date was the suspension made?

MR. RICHARDS: On the 2nd of February. I will ask you, Mr. Williamson, if there is going to be any question in the introduction of these various letters signed by Joseph Jacobs and other officers as to their genuineness, if so I will have to prove their signatures?

MR. WILLIAMSON: Not at all. I would like to examine each one of them first, however.

MR. RICHARDS: Certainly. If I have to prove these signatures you haven't Jacobs here.

MR. WILLIAMSON: I personally know the signatures.

Q. (Mr. Richards) Now, Mr. Henney, you were familiar with this canal as it was finally completed, I presume?

A. I was.

Q. I wish you would take the profile of the canal shown on Drawing No. 6A. In order to make it

(Testimony of D. C. Henny.)

intelligible to the jury I would like to have you indicate substantially—please examine that map and see if it is substantially an outline of the canal (referring to large drawing).

A. It seems to be.

Q. Now, as this canal was finally constructed, will you begin here (showing) and explain to the jury how the lining was and what the construction of the canal was, what part was unlined, what was lined, what was open canal and what was tunnel?

A. There was a certain distance from the head-gate at this point (showing) down the canal—my recollection is approximately half a mile—which was unlined. From that point on the canal is lined, according to my recollection, the entire distance.

Q. Now, as you come here (showing), from the end of the unlined to this first point called Steeple Tunnel, what kind of a canal is that?

A. Lined canal.

Q. I mean open or—

A. Open.

Q. And it is lined with what sort of shapes?

A. With circular shapes, extending around the circular somewhat more than the half circle, connected every two feet in the center of each shape, which is two feet long, by a cross bar.

Q. Something like these little forms here (showing)?

A. Yes.

(Testimony of D. C. Henney.)

Q. Each of these models here, Mr. Henney, would represent the lining as finally put in the canal (showing)?

A. This model (showing) would represent the shape as it was first made and of which a part, the smallest part, of the canal was built. I refer to the shape with a cross bar of a uniform cross section.

Q. In your statement, then, you refer to Defendant's Identification "I". Are these two just alike (pointing to Defendant's Identification "I" and "J")? How much of the canal was lined with the shape marked "I"?

A. Well, I could only say by far a small portion, the smaller portion.

Q. You don't recollect how much?

A. No, I don't recollect the number of shapes.

Q. Could you tell about how much?

A. No.

Q. You couldn't even estimate?

A. Yes, I can make an intelligent guess, I believe.

Q. What would that be?

A. Possibly a mile.

Q. Then the balance of it was lined with the form similar to Defendant's Identification "J," was it?

A. Yes.

Q. What is the principal difference in the two forms, Mr. Henney?

A. The principal difference appears to me to lie in the cross bar.

(Testimony of D. C. Henny.)

Q. Is there any difference in the manner of joining them?

A. Yes, there is a slight change in the groove at the end of the shape.

Q. The second shape "J" is grooved on both sides, is it not?

A. Yes.

Q. Now, which of those forms, Mr. Henney, was called for in the original specifications that Mr. Weisberger made with the government?

A. Can I refer to the specifications themselves?

Q. Certainly.

A. (Witness examines specifications) It appears to me that exhibit "I" represents on the smaller scale the shape as called for by the specifications.

Q. Will you please identify the specification by the page and number of drawing?

A. In specifications Exhibit "1", No. 116, shown on Drawing No. 8A.

Q. Now, as to the manner of joining, would this Identification "I" correspond to the other exhibit here, Identification—now, the Identification "I" corresponds in its manner of joining to Identification "B", does it not?

A. It does.

Q. And that was the plan as originally designed?

A. You refer to the specifications as specified?

Q. Yes, as specified.

A. Yes, sir.

(Testimony of D. C. Henney.)

Q. Now, the principal part of the canal, then, as I understand, was lined with shapes like "J," the jointing of which would correspond to "C" and "CC", am I correct in that?

A. Yes.

Q. Do you know approximately how many miles of it are lined with this latter form shape in joining?

A. That is about the same question as you put to me before. The remainder of it, the total may be about nine miles.

Q. When was this change in the manner of jointing these canals made, Mr. Henney?

A. According to my recollection, the change was made either immediately before the contract was suspended or, in other words, before the work was suspended by Mr. Weisberger, or immediately after.

Q. You don't recollect, do you, that there was any authorization ever given him allowing him to change the form of joint?

A. I do not remember.

Q. Do you remember whether or not, as a matter of fact, he had an application pending for leave to make a change in the form of construction at the time the contract was suspended?

A. You refer to the joints?

Q. Yes, and to the manner of construction of the shapes?

A. Yes, I know that there was an application made to that effect.

(Testimony of D. C. Henny.)

Q. And, so far as you know, that hadn't been acted upon at the time of the suspension?

A. I do not know that I fully catch the meaning. It had been considered.

Q. But his application was never granted, was it?

A. It was not granted.

Q. So that this change, then, in the manner of jointing these shapes and in the construction of the cross bar was undoubtedly made after the government took charge of the work?

A. Why, that is a little different. Your first question refers to the joint merely, the other question puts in the bar as well. I remember distinctly discussing with Mr. Weisberger the change in the form of the cross bar. I do not recall that he made any application to that effect or that such application was granted.

Q. The change, then, in the manner of joint was—you are clear about that—that that was made after the government took charge of the work?

A. I stated before that I did not clearly remember whether the change was made just before or after.

Q. I thought perhaps the fact of what we had said about his application might have made that so you could fix it in your mind.

A. I could not give you the exact date.

Q. Do you remember having any correspondence with Mr. Sweigart about a change in the joint in March, 1908?

(Testimony of D. C. Henney.)

A. Why, I remember a correspondence with Mr. Sweigart, and very likely about that time there was such correspondence.

Q. Do you remember that Mr. Sweigart submitted to you at that time a drawing that he recommended as a possible form of joint?

A. I remember—

MR. WILLIAMSON: I object to that. Correspondence between these engineers prior to any action being taken on this is immaterial. Any correspondence or discussion between the engineers regarding the change is material.

MR. RICHARDS: I am simply trying to fix the time with him when this change was made in order to make the balance of his testimony as intelligible as possible. I wanted him, if he could, to fix the time when they commenced the construction of this new joint.

Q. Don't you remember, Mr. Henney, that Mr. Sweigart submitted a proposed form of joint to you and you made some criticism on it?

A. Yes.

Q. And that was after the government was contemplating doing the work itself?

A. Well, that is just the very point I am trying to get clear on.

MR. RICHARDS: That is one of the letters we made a demand for of Mr. Williamson.

MR. WILLIAMSON: Introduce your copy.

(Testimony of D. C. Henny.)

MR. RICHARDS: I haven't it here That is all, then, on that point, Mr. Henney, at the present time.

Q. Now, I would like to have you resume the explanation. This, then, was lined with the open shapes down to this point called Steeple tunnel (showing). How was that tunnel lined, Mr. Henney?

A. According to my recollection, the tunnel was made large enough to permit the open "U" shape lining, corresponding to that model "I" and "A", I believe, to pass right through it.

Q. And the tunnel itself, was that lined with that or with the round shapes?

A. No, my recollection is it was not lined with the round shapes but that the canal lining went clear through.

Q. Now, under the specifications, they provide the tunnel should be provided with the round shapes, do they not?

A. My recollection may be helped out by the use of this (indicating)?

Q. Yes, you can refresh your recollection.

THE COURT: Lined clear over, do you mean?

MR. RICHARDS: Just shaped something similar to that on the wall.

A. The specifications, as is shown on Drawing on the tenth page of the drawings accompanying Specifications 18, show that it was the intention that in short tunnels the open canal lining similar to the

(Testimony of D. C. Henny.)

exhibits "I" were intended to pass through, short tunnels.

Q. And that is your recollection of what was done with that?

A. That is my recollection of what was done.

Q. And then from there on to what is called the Trail Creek tunnel, that was lined with open shapes, I presume?

A. Yes.

Q. You know how Trail Creek tunnel was lined?

A. According to my recollection, it was lined solid without the use of shapes.

Q. Why was that done, Mr. Henney?

A. I can only speak indirectly. That matter was decided when I was not present. It was done in order to cheapen the work.

Q. Did the condition of the manufacturing shapes, the way the shapes were to be manufactured, have anything to do with it, the manufacturing sites?

A. Not to my recollection. It was merely, according to my recollection, decided upon the question of cost.

Q. Now, as a matter of fact, wasn't that change made because of the fact that you didn't have the tunnel ready and wanted to go on with the construction of the balance of the canal beyond there?

MR. WILLIAMSON: I would like to interpose an objection to this, Your Honor.

(Testimony of D. C. Henny.)

THE COURT: I will pass upon the question later. You may proceed.

A. I have already stated that my recollection as to the cause of the change was that there was only one cause, that of cost.

Q. How long is Trail Creek tunnel?

A. By reference—

THE COURT: It is marked there, about thirty-three hundred feet, I think.

A. Yes, I think that is my recollection.

Q. (Mr. Richards) That was not lined with the shapes, then?

A. That was not lined with the shapes.

Q. Then coming to this next tunnel, Log Slide tunnel, the portion between those two points (showing) was lined with the shapes, was it?

A. Yes.

Q. Now, how was Log Slide tunnel constructed?

A. I am not entirely certain as to how that was constructed. My recollection, however, is that it was constructed with tunnel lining, the complete ring.

Q. Was the tunnel ever put in at all, Mr. Henney?

A. I do not now recollect.

Q. As a matter of fact, instead of building Log Slide tunnel here (showing), didn't they carry the canal around and make an open canal of it?

A. It is possible that that was done.

Q. You don't remember for sure?

A. I don't remember definitely.

Q. Now, do you know anything about any of

(Testimony of D. C. Henny.)

these other tunnels beyond here, whether they were constructed as originally designed?

A. I know the Column tunnel was constructed. I know that the Tieton tunnel was constructed and the North Fork tunnel were constructed as originally designed.

Q. Do you know whether these small tunnels were ever constructed or not?

A. I could not state that.

Q. You don't know whether they were tunnel form or open canal. The original specifications called for a tunnel here at Log Slide (showing) and to be lined with round shapes, did it not?

A. Permit me to refer to the—

Q. Yes

A. (Witness refers to plans) Yes, the North Fork tunnel and the Tieton tunnel were intended to be constructed also—it is here marked as the Weddel tunnel—also the Column tunnel.

Q. Log Slide tunnel show there, too?

A. I was just looking for it. Also the Log Slide tunnel, yes, sir.

Q. That was originally designed as a tunnel to be lined with the circular shapes?

A. Yes, sir, also—beg your pardon, to be originally designed with circular shapes? I am not entirely certain. The intention was that certain short tunnels should be lined or should have the canal lining pass through them.

Q. That wasn't a very short tunnel, was it?

(Testimony of D. C. Henny.)

A. Why, it is here marked a thousand feet. It is so marked, I believe, on the profile, approximately. Also the Trail Creek tunnel.

Q. The Trail Creek tunnel is designed originally to be made with circular shapes, did it not?

A. Yes, sir.

Q. How were the circular shapes to be jointed, Mr. Henney, in the tunnel construction in the original designs?

A. In the original design the joint was to be a flat one, that is, the ring was to have a flat ending, flat play, and come together to a certain distance with the mortar joint between.

Q. Practically the same joint as between the open shapes?

A. Except that the open shape shows a rise which is not shown on the tunnel ring.

Q. Under the specifications as made there in the original contract what does it provide the width of this joint shall be in those original designs (showing)?

A. You mean as to the width of the joint?

Q. Yes.

A. I do not definitely recall.

Q. Doesn't it show on the specifications?

A. Possilby (witness refers to specifications). No, I do not find it on Drawing No. 8A of Specifications 118, which do show the sections of the shapes. I do not find the width of the joint indicated there.

Q. Is the width of the joint on the open shape indicated?

(Testimony of D. C. Henny.)

A. I do not find it there.

Q. Look beyond and see if they are indicated in the subsequent sheet there.

A. On Drawing No. 10A the joint—the open canal shape appears to be one-eighth inch in width.

Q. Does the tunnel joint show there, too?

A. And the same is shown for the tunnel joint.

Q. That is, that these shapes as originally designed are to come together within an eighth of an inch?

A. Yes, sir.

Q. And then how is the joint to be filled, Mr. Henney, under the original specifications?

A. With cement mortar.

Q. Now, under the form as adopted after the government took hold how near did they bring the shapes together?

A. My recollection is that was decided—

MR. CAIN: I was just suggesting to Mr. Richards that is incompetent, irrelevant and immaterial. We can stipulate what those changes were.

THE COURT: I presume you can. I hope so. I presume he is pretty near through with this witness.

MR. RICHARDS: Read the question.

Q. (Question repeated).

A. My recollection is that we decided on approximately two inches as an average, which, of course, on curves differs, that is, they would possibly touch on the inside of the curve and be open on the outside.

Q. How far might they be open on the outside of the curve?

(Testimony of D. C. Henney.)

A. Why they might be open two inches and even more.

Q. Some of them ran as high as three and four inches?

A. I presume on some sharp curves they exceeded two inches.

Q. And these joints were filled in what way, Mr. Henney?

A. They were filled with a concrete, finished off with mortar.

Q. How was that filling done in the actual work of construction?

A. The horizontal portion, or the lower portion of the canal ring was filled open, and the more nearly vertical portions were covered with a strip and the concrete was put back of that, and where the canal shape extended above the ground another strip was put on the outside so that at such point the concrete was deposited between two strips.

Q. And the method of filling, then, was to go along the canal and fill these joints after the shapes were placed in the manner in which you say with the concrete?

A. Yes, sir.

Q. And did you have to do anything about keeping those joints wet after that was done?

A. Yes, sir.

Q. State what the method in regard to that was.

A. One method which was employed was to cover the canal for portions with gunney sacks to keep the

(Testimony of D. C. Henny.)

sun off and to wet the joints and sometimes wet the sacks. It may be that other methods have been employed which I did not observe.

Q. How long did you keep these joints wet after the concrete was put in them?

A. The general instructions were, to my recollection, ten days.

Q. How much of the canal would have covered at a time in that way?

A. I would say possibly fifty or seventy-five feet.

Q. How many joints, then, could you complete in ten days at about having seventy-five feet covered?

A. Why, much more than that. The covering may not have extended over the full work of ten days. I did not say that during the entire ten day period the joints were kept covered by gunney sacks.

Q. That was substantially what that was intended to do, or what they did do?

A. To afford protection to some extent and within a reasonable limit of cost to the joints that were fresh.

Q. Was there anything in the specifications, in the original contract about wetting the joints?

A. I do not recall.

Q. The same necessity for wetting this narrow joint made of different form of material wouldn't exist as in wetting the concrete joint, would it?

A. Yes, possibly more, because the water in the mortar, of which there would necessarily be less, would be more quickly absorbed by the adjoining

(Testimony of D. C. Henny.)

concrete than where the body of the joint itself is larger.

Q. But you don't recall that the specifications called for that?

A. I do not.

Q. Now, Mr. Henney, I want to call your attention to these locations on this map (showing), location four, and three, and two, and one, and ask you if you recollect, or by referring to the map attached to the contract could you tell what those indicate?

A. These circles were intended to indicate approximately the places at which yard space existed for the making of concrete and tunnel shapes.

Q. They were specified in the contract, were they not, as the places where the plant should be located for making shapes?

A. That is my recollection in regard to that.

Q. Did any change occur in those locations between the time the specifications were made and the contract was let and construction began?

A. I can only state that from the understanding I had. There has been a flood—there was a flood, and I have seen certain changes which took place in the canyon by the flood, but I am not prepared to give any definite testimony as to the exact changes which may have occurred to any one of those particular yards.

Q. There was a flood in the canyon, though, in the spring that year between the time the specifications were made, or in the fall, which was it?

(Testimony of D. C. Henny.)

MR. WEISBERGER: Fall.

Q. (Mr. Richards) Between the time the specifications were gotten up and the time the contract was let?

A. Yes, there was a flood something like four days before the bids were received, and, of course, considerably more time before the contract was let. Your Honor, one question early in the testimony. I may not have fully understood and I would like the privilege to have that re-read. It refers to the question as to whether I attended a certain conference. I may not have caught the full meaning.

THE COURT: I ruled out the testimony, but if you desire to explain your answer you can do so. The question was whether you attended that conference.

A. Yes, I would like to have the question re-read.

THE COURT: I think that was substantially the question. You repeat it again, Mr. Richards.

Q. (Mr. Richards) The question was, did you attend a conference with other officers of the Reclamation Service, at which conferences the excess cost which is charged to Mr. Weisberger here was charged up against the Tieton Water Users' Association and the land owners?

A. Yes. I think I have mis-conceived this question. I understood it to be whether I had attended a conference at which this fifty-one thousand dollars was decided upon as the charge to be made against Mr. Weisberger.

Q. No.

(Testimony of D. C. Henny.)

A. If the question, as I believe now, does have reference to a conference at which the cost of the project was estimated for the purpose of reporting to the Director at Washington, I was present. I understand the question right now.

Q. Yes, sir. You were present at that conference. Mr. Henney, had you ever had any experience or known of a canal like this being lined with this open shape concrete forms before?

MR. WILLIAMSON: We object to that as incompetent, irrelevant and immaterial.

THE COURT: What is the purpose of this testimony?

MR. RICHARDS: I think the evidence will show that this entire scheme and form of construction was new and untried, that they were all experimenting, and the reason Mr. Weisberger couldn't make better progress the first year was because there were many things that had not been settled.

MR. WILLIAMSON: I would like to refer to the part of his contract where two forms of proposed lining is shown and the contractor could take either one.

(Argument by counsel.)

THE COURT: I stated the rule this morning as laid down in the Supreme Court of the United States in a rather recent case where the Court says the well settled rule in this branch of the law is where a party by his contract charges himself with an obligation possible to be performed, he must make

(Testimony of D. C. Henny.)

it good unless his performance is rendered impossible by the act of God, the law or the third party. Difficulties even if unforeseen will not excuse him.

(Continued argument by counsel.)

THE COURT: Whether such a canal had ever been constructed before would not be material.

MR. RICHARDS: Possibly not, except showing it was experimental, they didn't know whether it had or not, and I think to that extent it might be relevant

THE COURT: I think it is rather remote. You can answer the question, however.

MR. RICHARDS: Read the question.

Q. (Question repeated).

A. If your question refers to that exact shape I will say no.

Q. I mean that shape and the original manner of jointing.

A. As to the jointing by itself, such joints I have seen made before.

Q. Had you ever had any experience with them yourself, with that form of lining the canal, this open form, open concrete shape method?

A. No.

Q. Have you ever seen a joint of that kind used in a shape of this sort on a scale as large as this was?

A. I haven't seen a shape as large as that used anywhere.

MR. RICHARDS: I think that is all.

(Testimony of D. C. Henney.)

Q. (The Court) For the purpose of information, how much of this canal did the defendant construct?

MR. RICHARDS: He only laid a very small portion of it. He built the shapes for enough to lay about a mile and a half but he didn't get very many of them laid.

A. This last question, may I add a little to that, Your Honor?

THE COURT: Read the answer.

A. (Answer read)—of that exact kind.

Q. (Mr. Richards) You might state, Mr. Henney, the dimensions of those shapes. If you don't remember you can refresh your recollection from the contract.

A. The inner diameter of the open canal shape was a little more than eight feet and of the closed tunnel shape a little more than six feet.

Q. Give the exact dimension of the open shape, Mr. Henney, as originally specified.

A. The radius is four feet and one and thirteen-sixteenths of the open canal shape and three feet and five-eighths of an inch of the closed tunnel shape.

Q. Did you state the diameter, Mr. Henney?

A. I stated the radius.

Q. What would the diameter be?

A. Of the open canal shape eight feet three inches and five-eighths, and for the closed tunnel shape six feet one and a quarter inches.

Q. Would that be the distance across here(showing) or through the largest part of the bulge?

(Testimony of D. C. Henny.)

A. Yes, sir, the largest part of the bulge, the diameter from this point through there (showing).

Q. It would be a little less across the top?

A. Yes.

Q. How thick were the walls of those shapes, Mr. Henney?

A. Four inches.

Q. And what was the original specification as to the size of these cross bars?

A. They were, I believe, four by four inches.

Q. That is correct, you don't need to look. What was the purpose of the cross bar?

A. To strengthen them in the middle.

Q. Keep them from falling apart when you went to handle them?

A. Keep them from developing side cracks.

Q. Did this as originally designed serve that purpose of preventing the development of cracks?

A. It did not in the way the shapes were handled.

Q. Had some trouble about hair cracks in them, did they not?

A. Yes, in the way they were handled.

Q. And was it to overcome that that the change in this cross bar was made?

A. Why, it was to overcome excessive cost and precaution in the handling of the shapes as designed so that they could be more readily and more cheaply handled.

Q. You received a communication in the fall, did you not, from Mr. Jacobs in regard to this

(Testimony of D. C. Henney.)

matter, the cracking of these shapes, Mr. Henney, the cracking that you speak of?

A. I received communications from Mr. Jacobs. Probably some of those were in the fall of 1907.

Q. Mark that for identification, (same being marked Defendant's Identification "L").

MR. WILLIAMSON: We object to it, Your Honor, on the ground it is incompetent, irrelevant and immaterial. It is a statement of opinion from the engineer that no action has been taken.

MR. RICHARDS: It is a report to Mr. Henney from his subordinate on the ground showing what these shapes do and the manner of handling them, and the purpose of offering it would be to refresh Mr. Henney's memory, and also to show it wasn't merely a matter of handling that caused these cracks.

THE COURT: You think the government is bound by his statements?

MR. RICHARDS: I say, merely going to call his attention to this—

THE COURT: You can submit it to him and refresh his recollection.

MR. WILLIAMSON: It is further a statement—

THE COURT: I am not admitting the letter.

Q. (Mr. Richards) Do you remember that (exhibiting paper to witness)?

A. Yes, sir, I remember receiving this letter.

Q. Did you make any examination of the shapes shortly after that?

A. Yes, sir, I was in the canyon.

(Testimony of D. C. Henney.)

Q. And found that the cracks developed substantially as you have already testified and as stated here?

A. Why, it developed that cracks occurred by the ordinary lifting of those shapes, which were cast on the side, lifting them on end. It is my definite recollection that with due precautions, by digging a hole under them that instead of bearing on the point of the center they got a much larger bearing underneath, that these checks could be prevented, so that it was a question, as I stated before, of the method of handling the shapes.

Q. The specifications originally provided they should be cast on their side, did they not?

A. I believe they did, yes, sir.

MR. RICHARDS: That is all. You can cross examine.

CROSS-EXAMINATION.

Q. Mr. Williamson) Mr. Henney, with the exception of the changes you have noted, was this canal constructed with the forms as you have described them?

A. Would you please put that question again?

Q. With the exception of the changes you have mentioned, was this canal constructed with the forms as you have described them?

A. Yes.

MR. WILLIAMSON: We move to strike the evidence so far introduced by the defendant bearing on those changes on the ground. The only changes testified to are clearly authorized by the contract and,

(Testimony of Theodore Weisberger.)

as a matter of law, are not actually a change in this case.

THE COURT: I will determine that question hereafter.

MR. WILLIAMSON: That is all.

MR. RICHARDS: That is all, Mr. Henney.

(Witnessed excused).

Whereupon adjournment was taken until 2:00 o'clock p. m.

Proceedings resumed at 2:00 o'clock p. m.

THEODORE WEISBERGER, produced as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

MR. RICHARDS: In regard to the matter of agreeing upon those changes, we didn't get that completed in going over them and we will try and have it so we can get it into the record tomorrow morning. It took longer than we anticipated it would.

THE COURT: Very well.

Q. (Mr. Richards) You may state your full name.

A. Theodore Weisberger.

Q. What is your occupation?

A. Contractor.

Q. How long have you lived in Yakima County?

A. Fourteen years last April.

Q. Did you take the contract that is in evidence here with the United States government?

A. I did.

(Testimony of Theodore Weisberger.)

Q. Will you state to the jury, please, the circumstances surrounding that contract, the taking of that contract, and what you did in regard to the commencement of the performance of the work on it, what you did?

A. You desire me to begin at the beginning?

Q. Begin at the beginning of the taking of the contract and the commencement of work under it.

A. A little preliminary would probably serve to make the matter a little more clear to the jury than if I begin at the time of the signing of this contract.

Q. Well, suit your own method.

A. The facts are these: That the United States Reclamation Service began the investigation of the Tieton canal project in the spring of 1906, according to my recollection of that beginning, and during the year of 1906, I should say along about July, the Secretary of the Interior, upon the representations of the engineers as to the cost of this project, and the fact that the charge per acre for water rights would be approximately sixty dollars per acre—

MR. CAIN: I don't see the purpose of that. This is all admitted in the pleadings, the taking of the contract, the commencement of the work.

A. I want to get to the advertising of the bids, Mr. Cain.

MR. CAIN: Whatever negotiations there were prior to the taking of the contract are merged in the contract.

MR. RICHARDS: Don't go into that in detail, Mr. Weisberger.

(Testimony of Theodore Weisberger.)

A. (Continuing) Along about the first of September of that year printed plans were received from the Washington office, which plans provided for a method of building this Tieton canal, and there were also received from the Washington office specifications covering the manner of doing the work and providing what form of contract the successful bidder would be required to enter into. There was a form of proposal, as I remember it, upon the first one to ten pages of the specifications, which provided just how the contractor was to put in his bid upon this work. The blanks were all there to be filled in. One paragraph specified that no modifications of that proposal would be considered, that any alteration in that form of proposal would cause the rejection of the bid, so that whoever bid upon this project was required absolutely to conform to every word of these specifications and contract. So I understood, when I applied for copies of this contract, that I was binding myself to the provisions of this contract. I had never before seen quite as drastic a set of specifications or contract—

Q. Don't go into comments on those things, confine yourself to facts and get to the commencement of the work as soon as you can, please.

A. Immediately after getting these copies I proceeded with the work of making estimates upon the cost of the different forms of construction provided in the contract. To make a proper estimate of cost it was first necessary to make an inspection of the

(Testimony of Theodore Weisberger.)

work, and this I proceeded to do about two weeks before the opening of bids at Portland, Oregon. These bids were to be opened on November 15th, so I made the trip into the Tieton canyon to look into the physical features surrounding this contract. I was familiar with the lower part of the canyon only—

THE COURT: I think this is only encumbering the record, Mr. Weisberger.

MR. RICHARDS: I think he is entitled to show what the condition of that canyon was, those manufacturing sites, the time he made the inspection.

THE COURT: Very well.

MR. CAIN: He is made the judge of that by the contract.

THE COURT: You may go on and state that part of it.

Q. (Mr. Richards) State what you found in the canyon in regard to those manufacturing sites.

A. I made a trip up in the canyon and found that the government was there at work opening up a road into the canyon. This was the only work being done at that time, and Mr. Jacobs, the engineer in charge of this work, had arranged that I should meet some one in the canyon who was to pilot me around and point out to me these conditions with which I was not familiar. So I met a young man up there at what was later known as Camp 2. I will point it out on the map. Camp 2 was located about here (showing), and the govern-

(Testimony of Theodore Weisberger.)

ment had roughly opened up a road to this point (showing). They had constructed a bridge at this point and another bridge at this point (showing) and were then working upon a bridge crossing at this place (showing). The men were hewing the timbers for that bridge at that time. There was no road to that point (showing). So to proceed further up into the canyon it was necessary that we proceed either afoot or by horseback. The government men there very kindly offered the use of a horse for my use, and my pilot took another horse, and we forded the river at this point (showing) and proceeded by crossing and re-crossing the river to the point of proposed intake of the canal, about this location on the map (showing). In that canyon there were small flats.

Q. Did you have with you the map that the government engineers had prepared?

A. I took the drawings and the specifications also, and as we went along I had the map in my hand and had the pilot point out to me these various situations. For instance, where these tunnels were, where this location was (showing), the proposed site of the road which is marked in black and the proposed site of the road clear on up the intake (showing), and he explained the features surrounding that contract to me, and while my visit there was quite short I became familiar with all the physical features surrounding that contract.

(Testimony of Theodore Weisberger.)

Q. Now, at that time did you find and examine these sites marked on drawing No. 2 attached to Plaintiff's Exhibit "1", which are designated as "Location No. 1", "Location No. 2", "No. 3" and "No. 4"?

A. I examined each one in detail.

Q. What did that mean on that map, those locations; what do they refer to in the contract?

A. In the contract there is a paragraph providing that the shapes to be manufactured under what was designated as Schedule 6A were to be manufactured at these locations.

Q. In other words, they were the manufacturing sites designated by the government?

A. They were, and it was specified that they should be made at those points.

Q. Now, what did you find in your examination at this time, before you put in your bid, in regard to those sites?

A. At Location No. 1, which is the first location at the lower end of the work, I needed no one to point that out with me because I was familiar with the river there. That point was a long narrow strip of land (showing) with little flats at this altitude covered with scrub oak, part of it covered with sage brush and willows and a few cottonwood trees. There was a fair cleared area there, was wild land, and I inspected this site as the site specified in this contract where all the tunnel shapes for the North Fork tunnel and the Tieton tunnel, which were the two long tunnels on the work at the lower

(Testimony of Theodore Weisberger.)

end there, were to be made. I also examined the surroundings there as to the possibility of securing a supply of sand and gravel for use in that contract. I was especially interested in this Schedule 6A and 7A, providing for building these concrete shapes.

Q. Now, what did you find at the next point? Find such a site—

A. Before I leave that, Mr. Richards, I would like to say that I estimated the area at that location and thought it was a little small, that by the economical use of space that it might be ample.

Q. What did you find the physical condition of the next location, No. 3, or No. 2—which way are they numbered?

A. They are numbered from the bottom.

Q. Did you find a manufacturing site there?

A. At Location 2 there was a nice site there. It looked fine. There was a homesteader named Bowman at that place.

Q. What was there at Location 3?

A. At Location 3—at Location No. 3, the area there was very restricted, and I doubted very much whether that place—

Q. Well now, there was a manufacturing site there?

A. There was a site there. That place was known as Camp 2.

Q. And at Location No. 4?

A. At Location No. 4 there was a good site.

(Testimony of Theodore Weisberger.)

Q. Now, while we are on that subject and before you go on with the rest of your narrative, when did you examine those sites again, Mr. Weisberger?

A. In March of the next year.

Q. That was after the contract was entered into?

A. Yes.

Q. What did you find their condition to be at that time

A. Why, the entire topography of the canyon lands was changed.

Q. By what?

A. There had been a flood.

Q. What had it done to those manufacturing sites?

MR. CAIN: Just a moment. I just want to ask a question.

Q. This flood took place before the contract was signed, did it not?

A. Yes, sir.

MR. CAIN: Well, we object to any evidence as to the physical changes in physical conditions prior to the signing of the contract. There certainly is no defense here.

A. I didn't know that, Mr. Cain.

MR. RICHARDS: I think that is not the rule. As the government engineer testified, they entered into this contract presuming those sites were there, the engineers believed them to be there, and then went on and completed the contract, and that if in the mean time the changes had occurred so that they were not there, that that would be such a change in the

(Testimony of Theodore Weisberger.)

pysical conditions and they were so mistaken as to the facts that it would be permissible to show that.

THE COURT: It might be a mutual mistake of fact which would warrant the parties refusing to proceed under the contract, but supposing they entered into the contract afterwards and attempted to carry it out?

MR. RICHARDS: There is a case decided by our Supreme Court where that very thing occurred, and they held there that is a mutual mistake as to the subject matter which relieves the performance of the contract.

THE COURT: Yes, but suppose after they discover the actual conditions they proceed under the contract, then is it an excuse?

MR. CAIN: I think not, Your Honor. By the very terms of this contract he is charged with notice of all physical conditions, and expressly stipulates that he take subject to them.

(Argument by counsel)

THE COURT: I will sustain the objection.

Objection. Sustained. Exception.

Q. (Mr. Richards) Now, Mr. Weisberger, you may go back to your narrative of the commencement of work under the contract.

A. I bid upon Schedule 6 and 7A, that is, I prepared the bid and mailed the bid to Portland and presented it there. The opening of bids was postponed until the 16th on account of these floods, which somewhat delayed the appearance of bidders, as the

(Testimony of Theodore Weisberger.)

engineers thought. I was, however, the only bidder. And shall I state what I bid, what for?

Q. Yes, state what you bid for.

A. On Schedule 6A I bid upon the manufacture of concrete shapes for the canal and tunnel lining for the flume supports specified on—

THE COURT: I suppose that is in conformity with the allegations of the complaint?

MR. RICHARDS: Yes. He is just stating the part of the work that he bid on.

THE COURT: Yes.

A. (Continuing)—shown on Drawing No. 8A, No. 9A, No. 10A, No. 11A of the drawings attached to that contract. In the same bunch of drawings there was shown a general map of the vicinity of the Tieton Canyon and a map of the Tieton canyon of which this (showing) is practically a reproduction on the wall.

Q. (Mr. Richards) Is that substantially the same as the second map in the contract on an enlarged scale, that one on the wall?

A. The general features—there are a few things on this contract—

Q. On that map?

A. I mean on this map which are not shown on the drawings, which I put there for the particular purpose of indicating them to the Court and the jury.

Q. You know that map to be a correct map of that portion of the canal and the country, the one that is on the wall, do you?

(Testimony of Theodore Weisberger.)

A. It is made as near to scale as a small drawing can be enlarged to a large one by hand work.

Q. And is a correct representation of the canal?

A. Yes, it is as near as can be.

Q. All right, Mr. Weisberger.

A. One consideration in making this bid was the element of the other five schedules, No. 1, 2, 3, 4 and 5A, as the work was divided into seven schedules. These seven schedules provided this, that Schedule No. 1 included the building of the dam and the head works for diverting water from the Tieton river into the canyon. Schedule 2 included the open canal excavation from the end of division one to station 200 as located on the canal. There was only one tunnel shown in this division. This was called Steeple tunnel, which is indicated here on the map (showing). Schedule 3 provided for an open canal excavation from station 200 down to a point approximately twelve hundred feet below what was known as Log Slide tunnel. In this division there were two tunnels shown on the drawing. One of these was Trail Creek tunnel, which proved to be later the hardest tunnel of all those provided on the canal to drive, and also proved to require the longest time in building. There was another tunnel in this schedule known as Log Slide tunnel. This tunnel as shown on the profile was approximately one thousand feet in length. This tunnel, however, was never built. An open canal was built around this point of hill (showing) instead of driving the tunnel through. Schedule 4 provided for

(Testimony of Theodore Weisberger.)

an open canal excavation from the lower end of Schedule 3, which is indicated here (showing). Also these are indicated on the map as Division One, two, three, four and five. In the specifications they are called schedules. Schedule 4 provided for an open canal excavation beginning at the lower end of Schedule 3 and extending to a point a few hundred feet above what was known as Tieton tunnel. In this schedule there was provided a small section of unlined canal, that is, this portion of canal (showing) was not to be lined with concrete shapes as provided in Schedule 6 and 7A. I might also mention that in Schedule 3 there was also a piece of unlined canal just below Log Slide tunnel, approximately thirteen hundred feet in length. In Schedule 4 there were four tunnels, one of them known as Columnner tunnel, some 1220 feet in length; Weddel tunnel—I can't give you the length of that, I don't recollect that.

MR. CAIN: I don't see this is testifying concerning anything, Mr. Richards, about which there is any dispute.

MR. RICHARDS: I think you ought to hurry over that, Mr Weisberger, and get to your—

A. I can speak a little faster if the—

Q. Get to your contract as quick as you can.

THE COURT: I presume this is a basis for cause of delay?

A. Partially.

Q. Proceed.

A. Schedule 5A provided for driving Tieton tun-

(Testimony of Theodore Weisberger.)

nel, approximately three thousand feet in length, and North Fork tunnel, nearly four thousand feet in length, and a small piece of canal connecting the two tunnels. It was necessary, before any work could proceed under Schedule 7A of this contract, which provided for laying shapes in the canal and tunnels, that all the work—or rather it was necessary before the work under Schedule A, or 5A, I should say, the five schedules from one to 5A, that these schedules should be completed before all the work under Schedule 7A could be performed by the bidder on this schedule, so it was taken into consideration when this bid was made that those five schedules would have to be completed in advance of the completion of the work under this contract, and a paragraph in the specifications provided just when those schedules should be completed, and a program was laid out in that paragraph whereby any intending bidder on any one of these schedules could lay out his work in reference to all the other schedules. Schedule 6A and 7A were, of course, more dependent upon the completion of these five first schedules than any of the other. In this paragraph it was provided just when those five schedules were to be completed, and were so arranged that any one of these five could be let to contractors separately from the other. The bidder who bid on Schedule 6A and 7A then had a right to presume—and I did presume—that these schedules would be completed so that the work under my contract could be performed within the time specified in this paragraph which named the dates for

(Testimony of Theodore Weisberger.)

the completion of the various schedules. None of these five schedules was let by contract. There were four attempts and finally the government undertook the completion of them by force account, so that the contractor for Schedule 6A and 7A, who turned out to be myself, looked to the government for the completion of these first five schedules. The government then, I considered, was in the relation of the contractor for these first five schedules. I returned from Portland, and when I arrived at North Yakima I was called upon by the Project Engineer and notified that I was the probable successful bidder for this work.

Q. (Mr. Richards) When was that, Mr. Weisberger, do you remember the date?

A. I was in Portland about a week before I could get away, the railroads were washed out.

Q. What date would that bring you back here?

A. That would bring it up to about November 22nd. And the Project Engineer stated to me that before the government would act upon my bid it would be necessary for me to make a financial showing by which the engineers might know whether I was able or not to perform such a heavy piece of work as this entailed. I made this financial showing and referred the engineers to my banker. Mr. Jacobs called upon my banker, and as a result of this conference—

Q. I wouldn't go into that.

A. Expressed himself as satisfied and stated that he had so notified the supervising office at Portland.

(Testimony of Theodore Weisberger.)

Q. Now, when was the contract actually signed, Mr. Weisberger, by you?

A. It was signed by me January 5th.

Q. When was it signed by the government?

A. January 24th by the Secretary of the Interior.

Q. Now, when did you first commence to perform any work under that contract?

A. I began about ten days before I signed the contract.

Q. It was in December

A. Yes.

Q. Well now, state what you did and follow along your actual work there.

A. I was advised by the Project Engineer that the Secretary of the Interior would act upon the recommendation of the local engineers, which was that I should be given this contract, and I was given assurance that there would be no hitch in his signing the contract, and that if I so desired I could begin work upon the contract. I recognized the necessity of this very clearly, because the time allowed for the completion of these two heavy pieces of work was extremely short. The work under Schedule 6A, entailing some hundred and forty thousand dollars worth of work, had to be completed by November 1st, and the mechanical difficulties surrounding this schedule were great and would require immediate action upon my part if I was to make any progress during the—

THE COURT: I think you are going into too many

(Testimony of Theodore Weisberger.)

details entirely, Mr. Weisberger. Confine yourself to what you did under the contract.

Q. (Mr. Richards) You say you commenced work in December. What did you do first when you commenced to get ready?

A. On January 1st I had a camp at Naches City, a crew of men there ready to build a warehouse.

Q. Had you done anything about ordering your machinery and stuff at that time?

A. I had placed orders for about seven thousand dollars worth of machinery. I was taking my chances on that. I had confidence in the local engineers.

Q. Then what work did you do in January? Just give the detail of the work as it progressed, if you can.

A. I purchased a block in Naches City and built a large warehouse there, large enough to store some thirty thousand barrels of cement. The amount of cement to be handled was very large under this contract. And on January 2nd we began work on that warehouse and it was completed about the middle of February ready for cement. Then we built a side track in from the railroad to connect with the warehouse to make it convenient for unloading cement. I laid out a complete program for work for the season, and began, as I stated, before the signing of the contract by myself, the purchase of machinery. It was necessary to begin these purchases early because the railroads were tied up. It was a very bad year in which to get material, and it seemed the entire northwest had

(Testimony of Theodore Weisberger.)

gone construction mad that year. It was very hard to get material and also men.

Q. Now then, what else did you do besides building that warehouse in January

A. After placing these orders the balance of the month was mainly given to preparing this program. I made some notes of the work for that month I would like to refer to.

Q. A general outline.

A. I also began in January one of the most vital features of this contract, and one upon which later arose a great deal of controversy between myself and the engineers. This was the building of a form in which the concrete shapes were to be made in the dimensions stated in the specifications and the plans. I had been given some advice by engineers in regard to how to build this form, and I first built a wooden form sawed out to a true circle and on which was fastened a steel sheet, forming a circular wall, and then there was an inside form made in a similar way so that the concrete could be cast between these two sheet steel walls, and when the form or structure was taken down a resulting shape would be that specified for the open canal lining.

Q. Did you do anything in regard to ordering machinery during January?

A. Yes.

Q. What?

A. We ordered two rock crushers and two con-

(Testimony of Theodore Weisberger.)

crete mixers, and gravel screens and a lot of small equipment.

Q. Do anything about an electric plant?

A. Yes, at this time I decided to build an electric plant in the canyon. Under these contracts it was necessary for me to have about eighteen units of power operating at one time, that is what I expected to do. Now, instead of hiring about eighteen engineers and having five or six teams hauling wood or coal I decided it would be cheaper and quicker to expedite the work to put in a hydro-electric plant in the Tieton canyon. The water power there was plenty, had a fall of about fifty feet to the mile, and I decided to locate this plant at a favorable spot of my own at the lower end of the work at Camp One, what was known as Camp One later, this point here (showing). By putting in an intake at this point here (showing) and coming across that flat, making a short cut across, dumping the water back into the river and made a fall of about twenty-six feet at that point, and I went to Mr. Jacobs and we discussed an arrangement to put in a plant at that place, and he told me—

Q. Who was Mr. Jacobs?

A. Mr. Jacobs was the district engineer.

Q. Representing the government

A. Representing the government, in charge of the government's work. And he seemed to be in entire accord with the plan, and we knew it would be cheaper, from our discussion, to go in together on

(Testimony of Theodore Weisberger.)

this plant and each one stand a proportional expense according to the amount of horse power he was going to use in that plant. I don't remember the exact figures—

Q. Just state what you did, what happened.

A. Mr. Jacobs fell in with the plan, sent to Portland and got an electrical engineer to report on the plan. The result was, they adopted the plan, built the plant themselves and shut me out, and I had to move up further on the river to put in my own plant.

Q. The government took this site you had located?

A. They took it. I had wasted a couple of weeks in negotiations, and I couldn't get up into the canyon very much further because the road wasn't constructed, and in March, very early in March, the earliest date that I could get up into the canyon, and this was the time that I discovered the destruction of their manufacturing sites, I went up there in charge of a surveying party, handling the level myself, to locate a plant. Now, it was necessary on account of this work to get quick action on this electric plant, so I knew, from a consultation with Mr. Arnold, an engineer, just what the fall of that river was, and I placed orders in the mean time for this hydro-electric plant—a peculiar situation, we bought the plant before we knew where we were going to put it, and we were going to locate sites to fit the plant, and I went up there to locate that site, and the government service got several flats between Camp One and what is known as the Trail Creek tunnel, and I didn't find a feasible plant

(Testimony of Theodore Weisberger.)

site between those two points, and the snow was very deep and we went on snow shoes in making this survey. The snow was soft and we had to dig holes down about three feet into the snow to set stakes. And we had to abandon that survey because we couldn't get up much further because the road, the old road that had been built above that previous season had been absolutely wiped out by this flood and had to be entirely re-built, and the bridges above that point were also washed out. We went back to Naches City, abandoned the survey, and later in the month went up again, after one of the bridges there was completed so we could make the passage. And we surveyed three sites above Trail Creek tunnel and finally found that the only feasible location was clear up here (showing) near what we later called the Sentinel Creek plant. I think the government called it our Camp One. We found here an excellent site, sixteen hundred feet of power canal gave us a drop of twenty-five feet, and there I finally located my power plant. We made a final survey and returned to Yakima. After going up to that site we found that the end of the road at that time, that is, about the middle of March, was at what is called Couall Creek.

Q. That is the road the government was building?

A. Yes, at that time was as far as we could go with a light rig (showing).

Q. Now, the jury can't see at all if you do that.

A. This (showing) is Couall Creek, this was the end of the road here (showing), a big pine tree, and the

(Testimony of Theodore Weisberger.)

government the previous season, that is, when I made this trip of inspection, was building a bridge across here (showing.) They had deviated from the plan shown on the drawing which is indicated here in black (showing, and were building this road around where I showed a red line (showing) and were crossing here then (showing) going up on a small flat and crossing back (showing). That was done to avoid a very steep side hill at this point (showing), of which you will hear more later. Now, Location No. 3 never was a good location for the manufacture of shapes, and at Couall Creek there was a nice flat, and when I returned to North Yakima after that first trip of inspection I asked Mr. Jacobs if he would allow a change of location of No. 3 to this site (showing), because I would rather make shapes there, and he stated that he would make it only if I could show it was absolutely necessary and the government's purposes would be served just as well. I figured that I could use this site for manufacturing shapes on this side of the river (showing) and also have access to this little flat on the other side (showing), which would help out the area. Now, when this bridge (showing) was destroyed by the flood the government re-located that. They wanted to cut out the bridges as much as possible because they didn't know when there would be more floods of this character and located the road on this side (showing), thereby making it impossible for me to get to this flat on the other side of the river to manufacture shapes. This (showing) was the end of the road, and we went

(Testimony of Theodore Weisberger.)

over this side hill (showing), over the frozen ice and snow packed in, to an abandoned camp along up in here (showing) and made that location for the power plant.

Q. Where did you have to begin manufacturing and laying, Mr. Weisberger, at the upper or lower end of the work, and where did the government commence its work in construction?

A. They began at the upper end.

Q. And you had to begin there to—

A. I began there also.

Q. Now, how far was that road built and when that the government was to build up there?

A. I don't quite get your question.

Q. I say, how far did the government ever build the road which they agreed to build to the diverting dam?

A. Finally?

Q. Yes.

A. This point indicated by a red spot (showing).

Q. How far is that below the diverting dam?

A. About a mile and a quarter.

Q. They never did complete it to the diverting dam?

A. Never did.

Q. Now, when did they get it done up to where they did finally complete it?

A. They broke a path through. They notified me on May 25th of that spring that they had completed the road.

(Testimony of Theodore Weisberger.)

Q. When was the road built was what I asked you?

A. It was built the next spring.

Q. When did the government finish the road so you could haul loads over it?

A. Up to the diverting dam?

Q. No, up to the point where they stopped, what time in the summer was it?

A. Why, it was about July 15th when we could get heavy loads over it.

Q. Could you get your machinery up there before that on the roads?

A. No. We tried that.

Q. What was the result?

A. Gave it up. Left a rock crusher standing in the road.

Q. Could you manufacture these shapes without a rock crusher?

A. Not very well.

Q. Well, now, to resume, Mr. Weisberger, what did you do in February and March; how far had you gotten in your description of your work there?

A. In February and March most of my efforts were given to designing a form for use on this Schedule 6A.

Q. Was the canyon so that you could work in it in those months?

A. No.

Q. Couldn't get up to the point where you had to manufacture?

A. No.

Q. Now, what did you do in April?

(Testimony of Theodore Weisberger.)

A. I want to say this in answer to that previous question, that we did some work in the canyon. We packed in there and established a camp.

Q. But you couldn't get your machinery up?

A. No.

Q. What did you do in April?

A. In April we began the excavation of this power canal.

Q. And what other work did you do?

A. Mainly we discovered in April—what we did in April was to discover it was going to be somewhat difficult to make forms to get these concrete shapes within the requirements of the engineer, and the contract provided that the engineer was to approve any forms which were built, and we couldn't get any approval on the forms which we constructed.

Q. Well, what was his requirement?

A. He stated right along, this was also stated by other of the engineers, that these shapes would have to be manufactured very close to dimension or they wouldn't fit when placed in the canal, and he indicated that requirement would be about one-sixteenth of an inch for correctness in radius.

Q. That is, you mean that he required you to manufacture them so that they wouldn't vary more than one-sixteenth of an inch from the center to the circumference?

A. That is the idea.

Q. Well, did you make any forms that month; did you devise suitable plans for making forms?

(Testimony of Theodore Weisberger.)

A. Yes, we worked out a form we thought would be satisfactory, worked out the main features. It was provided these forms, or rather this concrete shape were to be cast on their side, and in order to provide a base under these forms we had originally contemplated building a platform or what is called a pallet by concrete pipe builders. This pallet, of course, would be on a very large scale. That shape was over, well, nearly nine feet to the outside circumference, and it meant that we had to build a pallet about seven by nine and a half to hold that shape. That meant a lot of lumber. And we discovered this, that even though you leveled up that pallet with the utmost nicety with a tested carpenter's level you couldn't get the thing to a true plane such as would allow the casting of a shape which was true enough to comply with the plan shown for that work. According to that plan, which showed a joint an eighth of an inch in diameter, or rather in width, it would be necessary to get those shapes to within possibly a sixteenth, or not over a sixteenth, of an inch to a true plane at the bottom. If it was over a sixteenth of an inch the shapes might not meet at the two points so they would be as close as an eighth of an inch (showing). So we devised a scheme of abandoning entirely those pallets, those wooden pallets, and adopted a plan, which was later developed by myself and Mr. Crouholm, my superintendent, who invented a very ingenious device for making or forming a plaster base under those shapes. Mr. Davis was in North Yakima about the

(Testimony of Theodore Weisberger.)

time we made that discovery, and I put that proposition up to him and he seemed to be well pleased with the idea of making this base, and so I developed it. I made tests showing just how cheap a mixture we could use for forming this plaster base and found we could use one part of plaster to about eight parts of sand and mixed them wet and put it in between the two steel forms, and then lowered an affair which was later developed by Mr. Crouholm down between the two steel sheets. This tool had a handle and a guide which wouldn't allow the two to go down to within a greater depth than twenty-four inches of the top of the steel sheets, and at the bottom of this tool was a little wide blade, and on that blade was cut a notch which would form a little rib or projection on your plaster base just the outside of this groove (showing). When that base was hardened, and it only took about ten or twelve minutes for it to do so in the summer time, we could go on and cast the concrete on top of that base and the resulting form of the concrete would be substantially as shown at this end of the shape (showing). Now, the upper end of the shape was to be finished smooth with a plaster trowel.

Q. Now, when did you commence making forms?

A. We began the manufacture of forms—I will have to refer to a memorandum for that date first (witness refers to paper). I haven't the date, but the building of forms was begun early in April.

Q. Where did you build the forms?

A. We built them at Naches City.

(Testimony of Theodore Weisberger.)

Q. And then it would be necessary to haul them up to the site where you were going to manufacture?

A. Yes.

Q. And when did you get the forms up so you could get commenced to manufacture the concrete shapes?

A. The first bunch of forms, as near as I can recollect, went up about the middle of July.

Q. Was that as soon as the road was ready to get them up, a heavy load?

A. It was too soon as far as the road was concerned.

Q. Now, before you commenced manufacturing, after having had the forms up there, what else did you have to have?

A. Well, we had to have a complete concrete plant, a crusher for crushing rock, and a bin with a screen overhead for separating the various sizes of aggregate used in the concrete, and we had to have a concrete mixer, and a pump for supplying water in the yards, and a complete pipe system for providing water under pressure for sprinkling these forms. They had to be sprinkled for ten days.

Q. When did you succeed in getting that machinery on to the ground where you had to use it?

A. We attempted to get a crusher through in June, but abandoned that and left it in the road at what they later called Camp 3, the upper end of Trail Creek tunnel here (showing), and it was taken up, oh, about two weeks later, about the middle of July.

(Testimony of Theodore Weisberger.)

Q. What was the reason you abandoned it at that time?

A. Why, the freighter did all he could to bring it up. He had to abandon it there.

Q. On account of what?

A. Couldn't get over the road. Had about eight horses on, as many as he could string out on a narrow road.

Q. Now, when did you actually begin the manufacture of shapes, Mr. Weisberger?

A. The first shape was made, I think it was August 1st—August 2nd was the first shape made. Made one that day.

Q. Who was inspecting for the government at that time?

A. A young man named Zell.

Q. Did you inspect the shape you made that day?

A. Yes.

Q. How many did you make the next day?

A. We made five the next day.

Q. Was there any objection made to these shapes by the inspector?

A. Why, the first one we made he rejected; that is, as soon as we took the form off he notified us it wouldn't be accepted.

Q. For what reason?

A. Because it was not made close enough to the dimensions as laid down by the engineer.

Q. That is, the one-sixteenth requirement that you—

(Testimony of Theodore Weisberger.)

A. One-sixteenth of an inch.

Q. Did you succeed in getting them so they would meet his requirement?

A. We tried to.

Q. Now, go on and state how rapidly you manufactured after you got your plant going generally.

A. To get those forms within a sixteenth of an inch meant an enormous amount of labor. Some of the forms had been battered in bringing them over the road. The road wasn't wide enough and they had dragged on projecting roots and logs and had to be straightened out, and we found, when we set up those forms, that it took an enormous lot of tinkering in fixing and pressing to get them within the one-sixteenth of an inch requirement. Changes in temperature of the steel alone would throw them out considerably, and we wasted considerable time and it was very discouraging. The cost of setting up forms on such a proposition as this was enormous. I think the first forms we set up cost us anywhere from \$2.20 to \$6.80 a piece to set up. We were getting four dollars and a half for making the shape with that cast in it after the thing was cured and accepted by the government.

Q. Was that requirement of one-sixteenth inch adhered to all through the construction of the canal tunnel?

A. Oh, no, they had to abandon that.

Q. Did the government build them that close when it was making them?

(Testimony of Theodore Weisberger.)

A. No.

Q. What was the final allowance made for them?

A. Quarter of an inch on radius, half an inch on diameter.

Q. Now, tell us about how many shapes you manufactured there in August, or about how many you were manufacturing a day generally.

A. I made a memorandum on August first we made one shape; August 2nd, five—pardon me, will you correct that record. August 2nd, one shape; August 3rd, five shapes; 4th was Sunday; on the 5th, four shapes; on the 6th, six shapes.

Q. Never mind giving each day.

A. And about this time we had abandoned this proposition of setting up forms in this way. We found it was not going to meet the requirements of the engineer, some change had to be made in the method of setting those up.

Q. And what change did you make?

A. Well, Mr. Crouholm and myself devised what we later called a form mould, and this was a large affair on wheels that could be pushed around the yard. The forms were pushed into that and clamped down and braced up, and when they came out they were within the requirement and—

Q. How many forms did you make in all during the summer and fall of that year?

A. We made, I think it was 3216.

Q. That is, shapes?

A. Shapes.

(Testimony of Theodore Weisberger.)

Q. I mean how many forms did you have?

A. Two hundred and thirty-four.

Q. How many forms did you make in August altogether?

A. Well, about a hundred and nine.

Q. You say Joseph Jacobs was the engineer in charge at that time?

A. Yes, sir.

Q. I ask you if you have ever seen that letter before (exhibiting same to witness)?

A. Yes, I have seen that letter.

Q. How did you get it?

A. In the mail.

MR. RICHARDS: We offer that in evidence.

MR. WILLIAMSON: Objected to, Your Honor, as immaterial and irrelevant; goes to the question on which the Court has already ruled.

THE COURT: What is the purpose of the letter?

MR. RICHARDS: The purpose of the letter is to show that at that time the engineer who had charge of this expressed himself as satisfied with the progress he was making. Now, this will be followed up, if the Court please, with other showings as to what was done that fall and how he was stopped, all leading up to the proof of his compliance with his contract, and the fact that the Secretary of the Interior must have been laboring under a mistaken fact in this suspension.

THE COURT: This is only his review of the progress made.

(Testimony of Theodore Weisberger.)

MR. RICHARDS: He was a representative of the government on the ground. What information they got as to progress being made came from him. That was their method of arriving at these things.

THE COURT: As an admission it is not binding on the government.

MR. RICHARDS: What admission would be binding on the government in any of these cases?

THE COURT: No admission in conflict with the terms of the contract.

MR. RICHARDS: Is this in conflict with the terms of the contract?

THE COURT: His opinion as to what would be progress, what would that amount to?

(Argument by counsel)

THE COURT: I will admit the letter. I don't think it is binding on the government except in so far as it is confirmed by other testimony.

MR. CAIN: We will interpose an objection to any testimony tending to impeach the suspension of the contract by the Secretary of the Interior. We don't ask for a ruling on that now, but just reserve the right to strike the evidence in case it does not comply with Your Honor's ruling.

Letter referred to received in evidence and marked Defendant's Exhibit "N".

Q. (Mr. Richards) What progress did you make in the manufacture of shapes in September, Mr. Weisberger

(Testimony of Theodore Weisberger.)

A. We made in the month of September a thousand and twenty-five shapes.

Q. Did you make any in October?

A. Yes.

Q. How many did you make in October?

A. About the last of October we had about twenty-eight or twenty-nine hundred shapes manufactured. That is nearly correct.

Q. (The Court) During that month or all together?

A. That is all together.

Q. (Mr. Richards) Did you manufacture any in November?

A. Yes, sir.

Q. Up to what time in November did you manufacture?

A. I think we stopped on November 7th.

Q. I show you this letter and ask you if you—

A. I received that.

MR. RICHARDS: I offer that in evidence as Defendant's Exhibit "N".

Letter referred to, signed by C. M. McCullough, received in evidence and marked Defendant's Exhibit "N".

Q. Who was Mr. McCullough, Mr. Weisberger?

A. Mr. McCullough was Division Engineer in charge of project construction in the Tieton canyon for the government.

Q. He had succeeded to Mr. Jacobs place?

(Testimony of Theodore Weisberger.)

A. No, Mr. McCullough represented him in the canyon—empowered to act for Mr. Jacobs.

Q. Did you receive any order to commence laying shapes?

A. No definite order.

Q. Did you receive any communication regarding a delay in the laying of shapes (exhibiting paper to witness)?

A. Yes.

Q. Where did you get this letter?

A. My recollection is that was delivered to me in the canyon.

MR. RICHARDS: I offer that in evidence.

MR. WILLIAMSON: Objected to on the ground it is immaterial and irrelevant, has nothing to do with anything bearing on the contract.

THE COURT: The objection will be overruled.

Objection. Overruled. Exception.

Letter referred to received in evidence and marked Defendant's Exhibit "O".

Q. (Mr. Richards) Did you receive, after the receipt of that letter, any formal demand to begin laying shapes?

A. No, sir.

Q. Did you actually lay any shapes, Mr. Weisberger, that fall?

A. Yes.

Q. Where did you commence laying?

A. We began laying at the upper end of the canal,

(Testimony of Theodore Weisberger.)

at the beginning of the point where these shapes were to be laid in the canal, approximately at State 16.

Q. Do you know at that time or in the fall what portions of the canal were completed?

A. In a general way I do. The work was opened up down to Steeple tunnel, began the work in through along there (showing).

Q. That is, down to this point here (showing)?

A. Yes.

Q. Steeple tunnel. And had any of these other tunnels been constructed?

A. No, no other tunnels complete at that time. I think they finished Steeple tunnel that fall. I have no definite recollection on that.

Q. What was the condition of the weather in the canyon at the time you commenced laying shapes after this letter of Mr. Jacob's?

A. Well, it was cold.

Q. Was the ground frozen?

A. It was frozen in the canal in shady places.

Q. How long did you continue laying shapes that fall?

A. My recollection is we laid for six or seven days.

Q. What kind of shapes was it that you were laying, what outline, what shape, and the joint, these forms that are here before us?

A. The general shape of these sections was as indicated in this Exhibit "I".

Q. Identification "I".

(Testimony of Theodore Weisberger.)

A. And shown—the joint as shown in “B” and “BB.”

Q. When you came to put those shapes in the canal what was the result; what kind of a canal lining did it make?

A. It made what I considered an absolutely non-acceptable job.

Q. What did your contract provide in regard to the kind of the lining that should be produced by the manufacture and the laying of the shapes?

A. My recollection is that there was a general paragraph providing that for good workmanship that the completed result would be satisfactory.

Q. Would produce a smooth interior of the canal?

A. I don't remember that portion of the paragraph.

Q. Well, now, what difficulty did you find when you came to lay these shapes with this one-eighth inch joint and what was the result, Mr. Weisberger? Explain that to the jury.

A. The result was this: The shapes of this dimension—I would like to show the jury before I go into that the full scale drawing of this section.

Q. Well, if you have got one here.

A. I think that will give a proper idea (exhibiting drawing). I think, Mr. Richards, before we go into that it would be only fair to state the government made a concession of an eighth of an inch in radius along about September 9th, that is, instead of one-sixteenth of an inch from this central point to the point

(Testimony of Theodore Weisberger.)

indicated by the arrow (showing)—that is, that this shape here (showing) should require to one-sixteenth of an inch of being correct either for greater distance or less, that that error, allowable error, was increased to one-eighth of an inch. Now, each of these shapes which were accepted by the government might vary in diameter. If they were one-eighth of an inch in they were accepted, if they were one-eighth of an inch out they were accepted, which meant there might be a variation of one-quarter of an inch in this fall and one-quarter of an inch in this fall (showing), meaning that the shapes might vary one-half of an inch of coming together with flush faces when they were erected in the canal. As the jury can readily understand, a section of concrete as large as that in handling will develop certain erection stresses. After numerous experiments we arrived at the method of handling those shapes that would eliminate this cracking at the base of which Mr. Jacobs spoke in his letter. We found that without employing any special method and erecting those shapes to an upright state from the way they were placed on the side on the cast that they would crack at this point here (showing). We tried and tested a number. You take six men, three men at each corner—the shapes were very heavy, they weighed about, I should say about eighteen hundred pounds each—and the men would take a hold of the corners and raise up, and when they had one end of the shape about this height from the ground (showing) the shape would split across the bottom,

(Testimony of Theodore Weisberger.)

opening up in some instances clear through. That was caused, however, by the shape resting on the center here (showing), being a heavy ground of stress, owing to the heavy weight of the shape on each side, and we found that if we put a block of wood in here and a block of wood in here (showing) we could avoid that crack. The shape became distorted. You can't handle a proposition of that size without it becoming distorted to some extent because they were not non-flexible. The walls are too thin for the size of the shape, and when it was discovered these shapes cracked when erected there was a discussion among the engineers in our camp with myself concerning a new method of making these shapes whereby they might be thickened at the base, be made six inches at this point (showing) instead of four. We assured the engineers that we would attempt to devise some method by which these shapes could be handled successfully without increasing its depth, and finally worked out a method of picking them up without having this crack appear at the base. Measuring some of them I found that when they were up in position with a block of wood at this point and another at this point (showing), that the height from this cross bar (showing), to this point below (showing) would be apt to vary anywhere from a quarter of an inch to three-quarters of an inch of the measurement of that distance (showing) before it was erected, showing that the shape was limber, to use a common term, and distorted when erected. We transported about thirty-five of

(Testimony of Theodore Weisberger.)

those shapes at the upper end of the canal and placed them. The method of handling them was to have a strut, what we call a strut, a four by six, which would extend clear across the inside of the shape, and here (showing) was a steel shoe swiveled on a joint bent about the same radius as the inside of the shape. There is also a shoe at that end (showing) and two hooks above to the ceiling, and when that was raised up these shoes would pinch into the shape and have a bearing on the shape. Now, we found that unless we took care of the stress developed by bearing up on that strut we would have a crack in here (showing), at each end of the cross bar here (showing), so we had to overcome that pushing stress, that outward stress, developed by raising up on this sling, so we devised the idea of putting a rope sling from this point (showing) over to the opposite point and twisting that up after the fashion of an old Spanish windlass, and that way we handled it successfully, about thirty-five shapes. Our methods were new, we were experimenting and during the next season Mr. Crouholm developed some better methods with these same features I have stated, and applied to the work carried on by the government also. So that when these shapes were placed in the canal they would not fit, the faces wouldn't come flush. Now, this effected the canal in this way: In determining the capacity of any canal the calculations are based on a formula. There are certain functions in that formula. In this particular case the government used what is known as the Cutter formula, in

(Testimony of Theodore Weisberger.)

which there is a certain function which determines the roughness of the interior of the canal, and this state of roughness is indicated by a function called "the value of n ." In this case this function was designated in the plan and is shown on Drawing No. 10A, a little table at the lower end of the page, as .012. The engineers call it for short 012. This function is the one used for a very smooth lining. It contemplates that the concrete comprising the conduit through which the water passes will be smooth, that there will be no rough interior surface and no projections.

Q. That was the requirement in the specifications that that would be the formula that was to govern the interior lining of this canal?

A. I considered that was covered in the paragraph relating to good workmanship and the completed result, if satisfactory.

Q. Now, what was the result when you come to lay these shapes in the canal with these joints (showing)?

A. There would be projections; it would be narrow from a quarter to three-quarters of an inch.

Q. Projections like this (showing) one setting out—

A. No, setting in the canal further than its mate, or out further than its mate.

Q. What would be the result of that in the flow of the water in the canal?

A. Why, it would mean that a different function of the value of n should be employed for that canal.

(Testimony of Theodore Weisberger.)

Q. It would decrease the amount of water which the canal would carry, would it?

A. Very materially.

Q. Now, what would be the difference in overcoming that as between the joint that was required under your specifications and the joint that was adopted by the government when it took charge of the construction?

A. It would be to lessen the effect of these offsets.

Q. Now, explain to the jury why that would be, Mr. Weisberger.

A. In the specification the joint which is provided will have an opening between the outside of the shapes of an eighth of an inch, and this little groove (showing) being cast in the shape it is provided that a cement mortar joint should be formed in that groove. If mortar was pushed into this joint that could push back into the eighth inch opening (showing), so it is provided in the specification that a small part of this groove, about one-half inch in depth, should be caulked with oakum. The understanding, of course, was that this oakum was merely to prevent the mortar from running back into the joint. Now, when that mortar was filled in that space (showing), as provided in the plan, if it could have been done in that way, which it could not, the result would have formed a piece of cement mortar of this size (showing). That would fit right down in there if it had been in place (showing). Now, we couldn't make a thing like that. These projections (showing) interfered so that that projection here

(Testimony of Theodore Weisberger.)

(showing) had to be sloped off from this corner to the opposite corner (showing). It was not possible to ease off that projection by plastering from this corner out on the shape because that would leave a thin piece of mortar on there that would scale off. The shape here (showing), having cured, would be very dry and would rapidly absorb the water with which the cement and sand composing the mortar was mixed, and if that water was drawn out of the joint very rapidly the chemical action of the cement would stop. The combination of the alkali and the acid constituents of the cement require the presence of water as a solvent, so that when the water was eliminated from this joint (showing) the chemical action would stop, and it would result in a flimsy, dry, crumbling mass.

Whereupon a recess was taken for five minutes, and upon re-convening the followings proceedings were had:

Q. What would be the result, Mr. Weisberger, of that projection or shoulder in the lining of the canal in regard to forming eddies in the canal?

A. It would form an eddy more than that, it would tend to lessen the velocity of the water down the canal by opposing the direct line of the flow.

Q. In this form that was subsequently adopted by the government, what would be the difference in overcoming that condition?

A. That projection would be eased down, or rather sloped off so that it no longer remained an objection.

Q. Well, explain why and how.

(Testimony of Theodore Weisberger.)

A. Well, on Exhibit "B" and "BB" set an eighth of an inch apart, if there was a projection of a quarter of an inch that projection would only be eased off through the very slight degree afforded by this narrow joint (showing), that is, it would practically remain a projection. If it was more than this—if the projection was greater than a quarter of an inch the resulting projection or the slope of the joint necessary to attempt to ease that off (showing) would be more abrupt. In Exhibit "C" and "CC", I take it from the government's final account as examined by me that these joints (showing) were made about one and 44-100 inches from one edge of the shape to the other. That effected an increase in the length of the canal some three thousand and twenty-six feet by the government's own estimate as rendered by me. Now, when these (showing) were set an inch and 44-100 apart and a projection of a quarter of an inch, or three-eighths of an inch made it would ease off because the distance from one to the other was greater, and the angle formed there by this filling in of the joint would have lessend if the shape was nearer, and upon a visit up to the canyon I found that where the shapes varied to a greater extent than a quarter of an inch, three-eighths of an inch, these shapes were somtimes placed further apart so as to ease off this offset (showing). On curves, where this discrepancy was bound to be more marked, they are often set as far as six inches apart and the space between filled in with concrete, making a narrow piece of concrete, and in order to strengthen that thin piece of

(Testimony of Theodore Weisberger.)

concrete in there there was imbedded in there a reinforcing rod circling clear around in the joint space (showing).

Q. Which would be the more difficult to cast, Mr. Weisberger, the shape as originally designed with the plain edge or the one with the hollow in here for this increased joint (showing)?

A. The shape with the hollow joint would be more difficult and expensive to cast, first because it would take more plaster to form the projection necessary to make this groove in the lower part of the shape which rested on the plaster base (showing), and secondly, the groove was also formed on the upper end of the shape, requiring some extra work in finishing. On the original plan the shape was merely troweled off smooth. On the plan as adopted by the government after the suspension of this contract it was necessary not only to smooth off the top of the shape, but to bed in this shape as it laid there in the freshly cast state some bent circular irons which would form this groove (showing). Those irons in use as I saw them on a visit the following season, after suspension, were made in lengths, some four feet long bent to the radius of the inside part of the shape and with one end turned up so that these (showing) would be placed in the concrete, patted down, and this edge (showing) left projecting up, and after the concrete had hardened sufficiently so it would hold its own shape you can take a pair of nippers and catch hold of these projections and nip them off. All this was extra work.

(Testimony of Theodore Weisberger.)

The troweling had to be done as in the original shape.

Q. After you had tried setting these shapes and found these difficulties about jointing them did you make any application for a change in the manner of lining the canal?

A. I did immediately.

Q. What became of the application?

A. You mean where is it now?

Q. Well, what was done? Was ever any action taken on it?

A. No definite action.

Q. You remember when you made that application?

A. Why, I made application to the local engineer immediately upon discovering that these shapes couldn't be joined in the manner specified in the plan. I sent a letter immediately to the office of the Project Engineer, as I think his title was changed at that time—the Project Engineer.

Q. Did you subsequently follow that up with any further application?

A. I personally followed it up with the Assistant Engineer verbally.

Q. And did you make application to anybody but the local engineer as to the change?

A. Only after I found I could get no relief from this impossible form of construction from the local engineers. I spent two months in negotiations with the local engineers before I took it up with the Chief Engineer of the Reclamation Service.

Q. At the time of this order of notice of suspension

(Testimony of Theodore Weisberger.)

was served upon you had there been any action taken on that application for change?

A. When this notice of suspension was served?

Q. Yes.

A. Oh, no, no.

Q. They had never acted on your application to—

A. No, the local engineer had never taken any definite action. Do I understand—will you read that question and answer?

Q. Simply whether the application you had pending had been acted upon?

A. The question asked at what time?

Q. The time of suspension. Up to the time of the suspension had been granted or done anything in regard to that application?

A. No, unless there be a discrepancy in the answer here, I would like to add to that answer that the local engineer rejected my proposals for the change on January 8th, and I then took the matter up with the Chief Engineer of the Reclamation Service and made application to him, and this application was never acted upon.

Q. Now, Mr. Weisberger, at the time this letter of January 2, 1907, addressed to you by Mr. Sweigart, commanding that on or before the 8th day of January, 1908, you begin the work of making moulds and begin the delivery of cement on or before that day, what was the condition of the canyon and what were the weather conditions in Naches and Tieton canyon?

A. This is on—

(Testimony of Theodore Weisberger.)

Q. On January 2nd. I refer now to the letter which has been introduced here from Mr. Sweigart commanding you to do certain things (exhibiting same to witness).

A. At this time the weather was turning cold and the upper end of the road into the Tieton canyon was frozen to some extent, but the lower end was still soft, as I remember it. And the road was obstructed at a point about Station 200 by a gang of laborers at work for the government excavating the open canal. The road at this point (showing) passed immediately below a steep hill up on the side of which the canal was located, and when the laborers would throw the material out of the canal excavation it would go into the road so that road was absolutely obstructed, was impossible to pass beyond that point.

Q. Where was your plant with relation to that road?

A. It was on the other side.

Q. That was what he meant by his demand that you haul cement from Naches City to the place where you would want to use it, was that your understanding of that?

A. Why, that was partly. He—

Q. And what amount of cement did you have in the canyon or at your plant at that time?

A. Our last record of the timekeeper shows there was four hundred thirty-four sacks of cement stored at the upper canyon.

Q. How many barrels would that make?

(Testimony of Theodore Weisberger.)

A. Make—

THE COURT: Four sacks to the barrel.

A. Four sacks to the barrel would be a hundred and nineteen, approximately.

Q. (Mr. Richards): Had Mr. Sweigart, prior to sending you that letter, suggested how much cement you ought to have on hand in the canyon?

A. Just correct that estimate, a hundred and nine.

Q. (Continuing)—at the opening of the season in the spring?

A. He had.

Q. How much did he say?

A. He stated that I should have eight hundred barrels of cement.

Q. And you had a hundred and nine up there?

A. Had a hundred and nine up there.

Q. How long would it have taken to have hauled up there, when the road was open, that amount of cement with the teams you had had on that work?

A. About ten or eleven days.

Q. How many shapes did you have, or forms rather, did you have on hand for the manufacture of these shapes at that time, at the time he wrote that letter?

A. I think it was two hundred and thirty-four or two hundred and thirty-nine.

Q. What was the probable number of forms that you would need, or what number of forms did the government use the succeeding year in that work?

A. I couldn't answer that definitely. I was told how many; I don't know from actual count.

(Testimony of Theodore Weisberger.)

Q. Well, how many would you estimate would have been necessary?

A. About three hundred and forty or three hundred and fifty.

Q. How long would it have taken you to manufacture enough forms to carry on the work at the various points at which you could carry it on the succeeding year so as to have sufficient forms on hand at the opening of work in the spring?

A. Forty to fifty days.

Q. Do you know when, as a matter of fact, it was possible to commence work in the canyon at the manufacture of these shapes in the spring of 1908?

A. Yes.

Q. When?

A. May 5th work was resumed by the government.

Q. That was as early as the government resumed work there?

A. Yes.

Q. Was that as early as it was practical, so far as you know, on account of the weather?

A. It was impossible to begin earlier on account of weather conditions there.

Q. Do you know when the government completed the lining of that canal, completed the work that was provided in your contract to be done?

A. October 15, 1909.

Q. Had you, prior to the time the contract was suspended, had an extension on your contract?

A. Yes, sir.

(Testimony of Theodore Weisberger.)

Q. To when did that extension run?

THE COURT: That shows by the letter.

MR. RICHARDS: Yes, I think the letter shows.

A. I could figure it up.

Q. There is the letter (exhibiting same to witness).

A. Schedule 6A was extended to August 1st, 1908, with an additional sixty days for curing and acceptance of concrete shapes, to October 1st, 1908. Schedule A was extended to October 15, 1908.

Q. Schedule 7A. Do you know how early it was that this portion of the canal here (showing) was ready for lining, or when they could have commenced lining this section of the canal below Steeple tunnel?

A. Well, when I was on the work that piece of canal was not opened yet. There was a little piece of canal opened up just about Trail Creek. I knew that; I went past there; I could hear the blasting up there in the canal.

Q. Do you know how much canal was ready for lining at the time that you ceased work?

A. I think there was a mile and a quarter ready for lining.

Q. And how many shapes did you have on hand at the time you ceased work in the fall?

A. Enough to line a little over six thousand feet.

Q. That would be how much in miles?

A. About a mile and one-sixth.

Q. So you had on hand nearly shapes enough to line all the canal that was ready for lining?

(Testimony of Theodore Weisberger.)

A. All the completed canal.

Q. Could you, if the government had not interfered with you or suspended your contract, have completed shapes and kept up with the lining of the canal as rapidly as it was ready for lining?

A. Yes.

Q. Now, at the time of this so-called suspension on the first of February what, in the way equipment, machinery, and so forth, did you have on hand?

A. I had a complete hydro-electric plant with some two and a half miles of transmission line, transmission line leading from our plant to Canal Flat, where we expected to open up with the second plant immediately on the opening of the next season; and two rock crushers with bins and screens, elevators; two concrete mixers with self loading hoppers; two 20-horse power electric motors; one 35-horse power electric motor; one 40-horse power electric motor; two 10-horse power electric motors; one 5-horse power electric motor; one 3-horse power electric motor; eight dump wagons; track sufficient to lay about a mile and a half of track in the canal; a fully equipped machine shop at Naches City all ready for the work of making moulds for the next season; a warehouse sufficiently large to store about twenty-four thousand barrels cement, exclusive of certain area which I had sublet in an independent contract to the United States; a large bunch of special tools; machinery.

Q. What was the value of all that stuff?

A. And the forms.

(Testimony of Theodore Weisberger.)

Q The value of all that equipment and material and stuff you had on hand at that time at the place where it was?

A. Let's see, about—between sixty-nine and seventy thousand dollars.

Q. Can you give the exact—

A. Our account was rendered in this case, which I audited myself, gone over all the items, shows sixty-nine thousand some hundred dollars. I couldn't give you the exact amount.

Q. You have given it here at \$69,776.14. Is that correct?

A. Yes.

Q. That is the correct amount?

A. Yes, sir.

Q. What became of all that stuff that you had on hand when the government suspended the contract?

A. The government took it.

Q. Ever give it back?

A. Not yet.

Q. What has become of most of it, as a matter of fact?

A. Wore out, transferred to other projects, and they still occupy the warehouse.

Q. They kept your warehouse ever since, have they?

A. The last I heard they were still in there.

Q. What is the rental value of that warehouse?

A. I estimated in our account, based upon the amount of money invested in that warehouse, and the

(Testimony of Theodore Weisberger.)

ground and sidetrack, that the reasonable value of the rental would be one hundred dollars per month.

Q. Well, do you know that to be the reasonable value of it?

MR. WILLIAMSON: I take it that is all covered by Mr. Cain's general objection referring to all evidence tending to impeach the Secretary's suspension of the contract. If not we desire to interpose a specific objection.

THE COURT: What is the purpose of this testimony? to support your question of claim?

MR. RICHARDS: Yes.

THE COURT: I will be compelled to hold that under no circumstances can judgment go against the United States in this case.

MR. RICHARDS: I know, but facts might arise in this case so we will be entitled to an offset. I don't ask for judgment against them, I simply ask it to offset against any claim the United States may recover. I don't think we can get a judgment against the United States.

THE COURT: You may proceed.

Q. (Mr. Richards): Had you, at the time of this suspension, Mr. Weisberger, performed any work in connection with that project and in the manufacturing shapes and lining of the canal that had not been paid for?

A. Yes.

Q. What was the reasonable value of the work,

(Testimony of Theodore Weisberger.)

labor and material you had furnished in that regard?

A. I will have to refresh my memory.

THE COURT: You can call his attention to the amounts.

Q. (Mr. Richards): Eleven thousand—

A. Well, I performed more than than, but they had paid some.

Q. But that is the balance that hadn't been paid for?

A. Yes.

Q. What is the amount?

A. \$11,128.14.

Q. Mr. Weisberger, did you ever, to Mr. Morris Bean, the Acting Director, or to the Secretary of the Interior, say that you withdrew all objection to the suspension of this contract?

A. Absolutely and positively not.

Q. Did you ever consent or acquiesce in its suspension in any way?

A. Absolutely not.

Q. As a matter of fact, you were fighting the suspension all the time, were you?

A. I was fighting hard.

MR. RICHARDS: I think you can cross examine.

MR. MEIGS: I reserve the right to recall the witness for examination in chief.

MR. RICHARDS: Of course, you understand I haven't gone into these changes because of the supposition that we can this evening agree upon what

(Testimony of Theodore Weisberger.)

they were and stipulate as to that, so I eliminated that part.

MR. CAIN: If the Court please, at this time I move to strike the evidence of this witness for the reason that it has not developed any facts which show either fraud or such gross mistake as implies bad faith, or that he was prevented from completing the work within the specified time by the action of the government.

THE COURT: I reserve my ruling on that motion till the close of the testimony.

MR. CAIN: If the Court please, if we can adjourn now and take up this examination tomorrow morning I think Mr. Williamson and myself, by discussing the matter, can eliminate many features. If we have to go on now we will have to take up considerable time. I don't anticipate the examination will be very long.

MR. RICHARDS: We might possibly shorten the case in another way in addition to that in regard to the changes. We might analyze this testimony by us and see what you will admit to the facts and save a lot of corroborating testimony.

MR. CAIN: Yes, I think we probably can.

THE COURT: With that understanding the Court will take a recess until—

MR. WILLIAMSON: It is understood we want to try and get an agreed statement of facts this evening?

MR. RICHARDS: Yes, on those changes, and it

(Testimony of Theodore Weisberger.)

is possible we might save a good deal of time in putting in evidence corroborating Mr. Weisberger's testimony if we could agree that certain portions of its are substantially correct.

MR. WILLIAMSON: I don't think there will be any difficulty on the substantial changes.

MR. RICHARDS: No, I don't. And do you anticipate there will be any difficulty in agreeing to a good many things he has testified to we would be bound to support by other testimony if you didn't agree his statement was correct?

MR. WILLIAMSON: Well, there is some things he testified to we can agree to, subject, of course, to objection as to its materiality.

Whereupon adjournment was taken until February 21, 1912, at 10:00 o'clock a. m.

North Yakima, Washington, 10 a. m., Wednesday, February 21, 1912.

All present; continuation of proceedings pursuant to adjournment as follows, to-wit:

MR. RICHARDS: If the Court please, in conformity to the application and ruling that was made giving us the right to amend our answer and affirmative defense, I have prepared the amendment which we want to make and would ask that we may insert it as an additional paragraph to our second affirmative defense, without rewriting the whole answer.

THE COURT: That will be satisfactory.

MR. MEIGS: May I ask the same privilege, if Your Honor please, for the Surety Company, pre-

(Testimony of Theodore Weisberger.)

sending an amendment to paragraph III. as an addition to that paragraph, also?

THE COURT: Yes. It will be understood that the Government's general denial shall stand as to the amended answers.

Mr. THEODORE WEISBERGER, one of the defendants, and a witness on behalf of the defendants, on the stand:

DIRECT EXAMINATION (Resumed).

Q. (Mr. Richards) I want to ask you one or two more questions, Mr. Weisberger, before I turn you over for cross-examination. Mr. Weisberger, after receiving the letter marked as defendants exhibit "O", being a letter from Mr. Jacobs, dated October 22d, did you receive any other or instruction or demand to proceed with laying shapes in the canal?

A. This is the last of the correspondence on the subject.

Q. And you never received any further notice on the subject?

A. To lay shapes, none whatever.

Q. At the time, Mr. Weisberger, that you commenced work up there how far had the government done any work on the road, or how far was that road ever worked by the government?

A. Well, at the time we began work the road was completed, as I testified yesterday, to Corral creek, and while we were at work the government extended the road to a little beyond Sentinel creek,

(Testimony of Theodore Weisberger.)

the point of our first camp, but they never completed any road above that point—there is no road there today.

Q. They never did build the road, then, from Sentinel creek to the diverting dam?

A. Never did.

Q. How long is that distance?

A. Why, approximately a mile and a half.

Q. If that road had been built the balance of the way to the diverting dam, what difference would it have made in your work and in your construction of shapes?

A. We would have changed our program of manufacturing shapes and also of laying shapes. We would have put in a manufacturing plant just below the diverting dam where there was a good location for manufacturing and a good supply of sand and gravel, and began laying from that point down the canal.

Q. How far was it from the point where you did have to establish your camp, owing to the road not being constructed, to where you had to commence laying shapes?

A. The point where we began laying shapes was at Section 16, approximately sixteen hundred feet from the intake of the canal.

Q. And that was how far from your manufacturing plant?

A. About sixty-two hundred feet.

Q. About a mile and a quarter?

(Testimony of Theodore Weisberger.)

A. Approximately.

Q. And you had to transport the shapes that far to get them to the place of laying?

A. Yes. That figure that I have given you, length of the canal there, is approximate. I don't remember the station above our camp.

Q. Now, did you ever protest as to the condition of the road or make any demand on the government or its engineers for the carrying out of the government's agreement to build that road?

A. Protested every few days until they extended the road up to our camp. That served us temporarily.

Q. To whom did you make those protests?

A. To Joseph Jacobs.

MR. RICHARDS: You may cross examine, reserving the right to recall Mr. Weisberger later if we desire.

CROSS EXAMINATION.

Q. (Mr. Williamson) You say the road was constructed to Corral creek just below your last camp?

A. Yes.

Q. And never constructed up beyond that point?

A. Never constructed beyond a point about a quarter of a mile above our camp.

Q. No necessity for a road there, was there? Perfectly flat country, wasn't it?

A. There was a necessity, yes. There was no access to the upper end of the work without that road.

Q. That is, to the diverting dam?

(Testimony of Theodore Weisberger.)

A. To the upper end of our work.

Q. Was that feasible for you to have hauled the shapes from your upper camp on the road in any event?

A. No.

Q. The method would have been to have carried them up on a tram and then to grade to the toe of the canal? That was the method you adopted, was it not?

A. From what point do you have reference to?

Q. From your upper camp.

A. Well, there would have been no tram at that point. That was one of the advantages in locating the camp at that particular point, that the canal there was nearly level with the river, so it would require no team whatever. We could drag the shapes directly into the canal without any hoisting device whatever.

Q. Who selected your upper camp—the government?

A. I located the camp.

Q. When did you haul your first load of machinery in over that road?

A. My recollection is that we took a light load of stuff and got it through in May; my recollection is that it was May, approximately May 28th. That load was taken through with considerable difficulty.

Q. That was taken from Naches City; that is, that was your distributing point, was it not?

(Testimony of Theodore Weisberger.)

A. Well, all our freight was taken from Naches City.

Q. Did you have any difficulty that year in having your freight orders delivered to you at Naches City by the railroad from the east or wherever they were to come from?

A. Oh, we had a great deal of difficulty.

Q. You testified, Mr. Weisberger, and it is in the evidence that the time for completion of your contract was extended; was that on account of an application that you put in?

A. It was.

Q. It was the direct result of that application?

A. It was. The contract provided that that application should be made—

Q. The contract provides, does it not, that an application for extension of time for any reason should be specified in writing?

A. Yes, sir.

Q. And you so specified it in writing?

A. Yes, sir.

Q. Do you remember the causes or reasons upon which you based your application for extension of time?

A. I remember them quite clearly. They were based upon two reasons, that during this spring, as I have testified before, the northwest, to use a terse term, had gone construction mad and no equipment was to be had on the coast of the character that was required for this class of work, and the ship-

(Testimony of Theodore Weisberger.)

ments of equipment and much of the special machinery and supplies needed on this work had to be ordered in the east. Added to that difficulty was the fact that the railroads were overburdened with goods offered for shipment to coast ports. It was a terrible year for transportation. The supply men on the coast told us that they had car after car—

THE COURT: He is asking the reasons you gave the department.

A. (Continuing) Those were some of the reasons, Your Honor, as I remember them.

Q. One of the reasons, then, was the heavy construction work going on in the northwest and the congested condition of the railroad. That is one of the reasons you gave in brief—is that a brief statement of it?

A. Hardly. I thought I stated in that letter the ultimate fact only that the shipments which were ordered had been delayed from these causes, and I named the dates on which the orders were placed and I named the dates on which those orders were delivered, estimating therein the normal time of delivery, stating the excess time used up in transportation. That was the first reason.

Q. Did you, Mr. Weisberger, as a reason for your request state that the government had delayed you some four months on account of their failure to complete the wagon road?

A. I stated that under an agreement with Joseph Jacobs.

(Testimony of Theodore Weisberger.)

Q. You stated that in your application for an extension of time?

A. Under a verbal stipulation with Joseph Jacobs as to those months.

Q. You agreed at that time with Mr. Jacobs, then, to charge your delay had been on account of the failure to deliver.

A. No, I did not. He stated that unless I would confine myself to those four months that he would not recommend the application, that he would turn it down, flat. That is what he told me.

Q. But you specified the four months?

A. I had to or get no extension.

Q. But you did express them did you not?

A. I could not get an extension any other way.

Q. But you did express them?

THE COURT: Answer the question.

A. I had to.

Q. Did you or did you not state in your application, Mr. Weisberger, that you were delayed until May 20th, at which date the government completed the road?

A. That was one of the stipulations required.

Q. And you agreed to that and stated that in your application?

A. Under what I always considered was—

THE COURT: Answer the question and offer any explanation you may have. The question is definite.

THE WITNESS: All right, sir. Will I then

(Testimony of Theodore Weisberger.)

be allowed, Your Honor, to offer an explanation afterwards?

THE COURT: Answer the question and then offer your explanation afterwards.

Q. (Last question read). Just yes or no, Mr. Weisberger.

A. Yes. Acting upon Mr. Jacob's statement that he would not allow nor recommend the application unless I limited in that letter this date of completion to that time.

MR. WILLIAMSON: I move to strike the explanation, Your Honor, as having no bearing upon the question. He stated that he applied for an extension of time, and that in the application he stated the reasons and the definite time that he was delayed, in accordance with paragraph 21 of those specifications. That is conclusive and binding.

THE COURT: The answer may stand.

MR. RICHARDS: Have you the original application?

MR. WILLIAMSON: I have not, but I have a copy which I will gladly produce. I have been unable to find the original.

MR. RICHARDS: I wish you would produce your office copy.

MR. WILLIAMSON: I will offer this copy in evidence, then, Your Honor, at their request. I have no objection to it at all.

MR. RICHARDS: I did not ask you to offer it in evidence; I just asked to see it.

(Testimony of Theodore Weisberger.)

THE COURT: You may proceed with the cross examination while Mr. Richards is examining the paper.

Q. Mr. Weisberger, you stated yesterday that you made an application to the engineers for several changes. Did you at that time specifically ask them for the change in joint, as you testified yesterday, and did you answer that that was adopted by the government?

A. No.

Q. At the time you bid upon this work two methods of construction were presented to you for your selection, were they not?

A. Yes, sir.

A. One, the form of construction as indicated in the testimony so far and illustrated by these forms?

A. Yes, sir.

Q. One, a lining of the canal in place, with concrete mixed in the canal, approximately?

A. Yes, of a different type and form.

Q. And requiring a different excavation entirely of the canal, did it not?

A. Yes, and an entirely different kind of work.

Q. Now, Mr. Weisberger, in your application for modification which you suggested yesterday that you made, is it not a fact that your application was an application to entirely abandon this kind of construction and adopt a method of construction which was more nearly like the type, the alternate type in the bids?

(Testimony of Theodore Weisberger.)

A. Why, no; there was no resemblance between the two.

Q. Was it, however, a practical abandonment of this method of construction?

A. No, sir, not at all.

Q. You intended to manufacture these shapes and place them in the canal if your application for modification of plans had been granted?

A. We intended to manufacture the exact dimensions of the circular part of the shape, and manufacture it in the canal instead of on these manufacturing sites.

Q. As a solid piece?

A. As a solid monolithic form of construction.

Q. Then your application did not go, as was the impression gathered from your testimony yesterday, to the exact change in joint which was afterwards made by the government?

A. No, there was nothing said about joints.

Q. Nothing said about joints in your application?

A. That is, for change in joints.

Q. Yes, I understand. Was that application ever considered by the government to your knowledge?

A. Yes.

Q. It was discussed by you with them?

A. Yes.

Q. By them, meaning the local officers?

A. Yes.

Q. And the officials at Washington at the time of your visit?

A. Yes, sir.

(Testimony of Theodore Weisberger.)

Q. You presented the matter in full to them at the time?

A. Yes.

Q. To your knowledge did Mr. Davis make a special examination of the proposed change?

A. I could not answer that. I can say, however, that he had received a report from Mr. Henney on the subject before I arrived there.

Q. The change suggested by you was one of design rather than structure, was it not?

A. I don't quite get your question there.

Q. Your application for change that you spoke of yesterday was one rather of design of canal rather than of construction?

A. No, not at all. It was merely a change in the method of making the same thing.

Q. That is, change in the method of making a concrete canal?

A. Yes, not of this particular kind.

Q. Mr. Weisberger, you testified that on October 22nd you received an order from Mr. Jacobs, a copy of which is shown in the record as Defendant's Exhibit "O," which reads in part: "I desire therefore that the matter of handling these shapes and laying be carefully considered and discussed between us before the actual laying in begins." Did I understand you to testify that you considered that letter an order to stop work on laying shapes?

A. I think it is right that—in fact, it states so.

Q. But you testified that you never received any

(Testimony of Theodore Weisberger.)

definite order from Mr. Jacobs or other officer of the government to begin laying shapes?

A. No.

MR. RICHARDS: No, Mr. Williamson, he testified he never received any after this letter Exhibit "O".

MR. WILLIAMSON: Yes, that is right. That is what I had in mind.

Q. Did I understand you to testify that after this date you received no further orders to begin the laying of shapes?

A Which dates do you refer to?

Q. October 22nd, the date of this letter to you, this letter which you construed as an order.

A. After this letter I don't recall any correspondence on the subject of laying shapes.

Q Did you, Mr. Weisberger, after that date lay any shapes?

A. Yes.

Q. There is introduced in evidence, marked Defendant's Exhibit "N," a letter signed by E. McCullough, and addressed to you, dated November 4, 1907, which reads: "You are instructed to discontinue the manufacture of concrete shapes on schedule 6A after filling the seventy forms which are in place this morning. This operation is to continue not later than noon of November 5, 1907."

A. Yes, sir.

Q. Did you consider that a breach of your contract?

(Testimony of Theodore Weisberger.)

A. No. There was a paragraph in the contract providing for a notice.

Q. The weather conditions at this time were what?

A. They were good just then, at the time this notice was received and for several days thereafter.

Q. Well, your notice was to take effect November 5th. That notice was issued to you presumably in accordance with the specifications?

A. Yes, sir.

Q. You understood that the reason of it was the fact that the weather was too cold to continue the manufacture of these shapes?

A. That was the reason, yes, sir.

Q. When did you make your first shape?

A. August 2, 1907.

Q. When did you complete your first form?

A. I do not recall the date.

Q. Just approximately? I don't mean the first experimental form, I mean the first final form which you completed and subsequently used in the construction of shapes.

A. It is a long time to remember distinctly. Well, I should say it was in June.

Q. In June?

A. I think so.

Q. Where did you carry on the experiments and work, Mr. Weisberger, in the matter of completing those forms?

A. At Naches City.

Q. You testified as to some difficulty in hauling

(Testimony of Theodore Weisberger.)

those forms to the work Did you continue to haul them up there?

A. No, we discontinued that.

Q. You discovered, as a matter of fact, it was better to haul them up in pieces and assemble them at the work, did you not?

A. Yes. We discovered that the road was not wide enough We hauled them up, knocked down and assembled them on the work.

Q. The process of assembling them on the work or at Naches City were largely the same, was it not?

A. Practically the same.

Q. Speaking of forms, Mr. Weisberger; that form that you manufactured was a form for the open canal shape, was it not?

A. Yes, sir.

Q. Did you ever make a form for the tunnel shapes?

A. No, sir.

Q. I understand you to say you never made a tunnel shape?

A. I am not sure. I think we made one at Naches City, but I am not certain about it.

Q. The form precedes the making of the shape usually, does it not?

A. Yes.

Q. On August 30th you received a letter from Mr. Jacobs, which is introduced in evidence as Defendant's Exhibit "M." Mr. Jacobs says: "Referring to my notice to you of August 16th regarding the

(Testimony of Theodore Weisberger.)

recommendation that your contract be suspended in the event that you are not making due progress on August 30th, I have to advise you as follows." What was the nature of that letter of August 16th, Mr. Weisberger, do you recall?

A. I think it was a warning of suspension.

Q. Had you had some discussion with the engineers prior to August 16th regarding the progress you were making upon your work?

A. Yes.

Q. Did they express themselves at that time as being satisfied or dissatisfied with your work.

MR. RICHARDS: I believe that is immaterial, if Your Honor, please, in the face of his subsequent letter.

THE COURT: He may answer the question.

A. With certain features, yes; with other features, not.

Q. "On my recent visit to the Tieton canyon, from which I have just returned, I was much impressed with the general progress you have made since the date of my previous visit, and feel that you are making every effort to improve the output of your plant." The quality of the work being done by you was in question, was it not, Mr. Weisberger?

A. The quality?

Q. Yes, as well as the quantity.

A. The quality was not except as to the dimensions of these shapes.

Q. Which you subsequently attempted to modify,

(Testimony of Theodore Weisberger.)

as you explained yesterday, by an ingenious device?

A. Yes, to overcome the exact requirement of the engineer in respect to those dimensions.

Q. "I will therefore for the present make no recommendations looking towards the immediate suspension of your contract, but will urge that you continue in your efforts to increase your outputs to the end that you may shortly be able to manufacture one hundred shapes per day." Did you receive any subsequent letters, Mr. Weisberger, from Mr. Jacobs as to whether or not he was satisfied with your compliance with the requirement that he states in the letter that I just read?

A. That he was satisfied?

Q. He says: "I will for the present make no recommendations looking towards the immediate suspension of your contract, but will urge that you continue in your efforts to increase your output."

MR. RICHARDS: It seems to me that is immaterial, if the Court please, whether he received a subsequent letter or not.

Q. I will ask you if you have any subsequent letter showing whether or not this engineer was satisfied with your compliance with this letter.

A. I don't recall, Mr. Williamson.

Q. Did you ever increase your plant or output to one hundred shapes per day, Mr. Weisberger?

MR. RICHARDS: That is objected to as immaterial, if the Court please.

THE COURT: It probably is material in view

(Testimony of Theodore Weisberger.)

of the contents of the letter, the letter having been received in evidence.

A. No.

MR. RICHARDS: There is no requirement anywhere, if the Court please, that that shall be the output, or that that is what he shall manufacture.

THE COURT: No, but if the letter there is to be received as evidence against the government I think this testimony is competent.

Q. You never reached one hundred shapes per day?

A. No.

Q. What was the largest number of shapes you ever made in any one day—do you recall?

A. As I recall it, it was seventy-two, or might have been seventy-eight.

Q. What was your average—do you recall that?

A. I could give you that by referring to a memorandum, if you would like to have it exact.

Q. Can you give it approximately?

A. The average output I think was thirty-six a day.

Q. "And that you will thereafter continue to improve your plant and the general efficiency of your force in order that your output may be increased beyond one hundred per day. This constant increase I am sure will appreciate as absolutely essential." Did you receive any letter—

THE COURT: He has testified he has never received any other letters as far as he can remember.

Q. Referring again to your application for the

(Testimony of Theodore Weisberger.)

change of design: Did you, Mr. Weisberger, or not state that you could not construct the canal in the manner covered by your contract?

A. Yes.

Q. Prior to your application for an extension of time—first I will ask you, do you recall the date of that extension?

MR. WILLIAMSON: Mr. Richards, would you object to the introduction of this paper (showing) in evidence?

MR. RICHARDS: Do you offer it?

MR. WILLIAMSON: I offer it in evidence, yes, sir, as an exhibit on behalf of plaintiff.

MR. RICHARDS: I object to it as incompetent, irrelevant and immaterial and not—

MR. WILLIAMSON: I do not care to press it, Your Honor, if it is objected to.

THE COURT: Of course it is incompetent.

MR. RICHARDS: We waive the fact that it is not the original as far as that is concerned, but urge the objection that it is immaterial, irrelevant and is not binding upon the defendant, nor should it be received as evidence of any fact in regard to the construction of the road by the government.

MR. WILLIAMSON: I will withdraw my offer of it in evidence, Your Honor.

THE COURT: Very well.

Q. Mr. Weisberger, we have so far in our testimony and our talk this morning assumed the construction of your work there and the building of

(Testimony of Theodore Weisberger.)

these forms. Will you state what else was covered in your contract and that you performed except the actual construction and placing of these forms? Let me, to save time, ask you this question: Did you have under your contract the duty of hauling cement from Naches City to the work?

A. Yes, sir.

Q. And did you also have imposed upon you by the terms of that contract the duty of hauling steel for re-forming the concrete from Naches City to the site of the work?

A. Yes, sir.

Q. There was an extra compensation, was there not, for the hauling, handling and placing of steel?

A. Yes, sir.

Q. You hauled a considerable part of that steel, did you not?

A. Yes, sir.

Q. And hauled a considerable part of it prior to July 5, 1907?

A. My recollection is that the bulk of that steel was hauled after that time. I would not be able to testify to that, Mr. Williamson; I do not remember.

Q. Much more steel, however, was hauled than was ever placed in the cement, was there not?

A. As I recall it there was.

Q. Did you make an application, Mr. Weisberger, to the engineers, in July or August, 1907, for part payment for the work of handling and hauling?

MR. RICHARDS: I object to that as incompetent,

(Testimony of Theodore Weisberger.)

irrelevant, immaterial and not proper cross examination.

THE COURT: It seems to me immaterial unless it is leading up to something else. In itself it is immaterial I think.

MR. WILLIAMSON: It is in itself, but I have in mind leading up to a matter that will be material.

THE COURT: Very well; the objection will be overruled.

MR. RICHARDS: We note an exception.

Q. Did you make an application, Mr. Weisberger, to the engineers, in July or August of 1907, for part payment for the work of handling and hauling or orally?

A. I made an application; I do not remember the date.

Q. Was that application in writing?

MR. RICHARDS: Same objection, if the Court please, and exception to the admission of this testimony.

THE COURT: Yes. As I said awhile ago, I think it is immaterial in itself, but you may answer the question.

A. Yes, it was granted.

Q. Upon what did you base your application, Mr. Weisberger?

A. Upon an approximation of the unit price of one and one-half cents per pound for hauling and placing, decided upon between myself and the engi-

(Testimony of Theodore Weisberger.)

neers as to what part of this one and one-half cents the hauling was to be.

Q. You tried to separate it in order to get the money that was due you on that portion?

A. Yes, sir.

Q. As a matter of fact, Mr. Weisberger, in your statement to the engineers did you not state that unless such payment was made, owing to your financial condition, you would have to shut down the work?

MR. RICHARDS: That is objected to as incompetent, irrelevant, immaterial and not cross examination.

MR. WILLIAMSON: He stated, Your Honor, he was able to go ahead with this work. I think I have a right to go into all the features to find out if he was.

MR. RICHARDS: That element has never been injected into the case. I do not think it is material at this time. The question of his financial ability, one way or the other, as long as he continued to work, or until he quit on that account, would not be material. It is not one of the elements provided for in the contract.

THE COURT: I think I will sustain the objection.

MR. RICHARDS: Now I move to strike all this testimony the Court let in leading up to this question.

THE COURT: It is immaterial; it cannot harm anybody.

MR. WILLIAMSON: The government will reserve an exception.

(Testimony of Theodore Weissberger.)

Q. Did you state to the engineers, on or about January 1, 1908, that unless the change in design was made you would be unable to finance the further operations?

MR. RICHARDS: That is objected to as incompetent, irrelevant and immaterial and not cross examination.

(After argument by counsel).

THE COURT: This defendant testified that he had the ability to do certain things; that he would have done them in a certain number of days if the government had not interfered. I think, in view of that testimony, the cross examination is proper.

MR. RICHARDS: I do not think so, if Your Honor please, when considered in connection with the manner in which that testimony was brought about. Now, that question and the testimony of Mr. Weissberger and the other engineers on that subject, was as to the physical impossibility of completing the contract within that time. I asked him if he could manufacture those shapes; now, the only intention that I had in asking that question, and I think the only implication that could be drawn from the question as it then stood, was the possibility of doing the work.

THE COURT: Oh, that it were impossible there could be no question, and unless it had some special application to the defendant the question would have been meaningless.

(After argument by counsel).

(Testimony of Theodore Weisberger.)

THE COURT: If that is the construction you place upon his testimony, Mr. Richards, I think myself that it is immaterial. If you will concede the fact that he has so testified I will sustain the objection.

MR. RICHARDS: I do not know whether I would want to do that until I understand just what the Court means.

THE COURT: My understanding of the testimony is that Mr. Weisberger testified that he himself could have completed the work within the time stated in the extension, and if he has so testified this cross examination is manifestly proper. If he simply testified to the abstract question that it was physically possible to complete the work within that time if you had sufficient money and means and everything of that kind, why, I think the testimony is inadmissible.

MR. WILLIAMSON: If they have not introduced any evidence, and do not claim they have introduced any evidence, as to whether or not Mr. Weisberger was able to finance that work, and what his financial condition was, why, then the testimony is immaterial.

THE COURT: If you concede your testimony does not go further than that, then I will sustain the objection. In other words, if you admit now that you have not offered any testimony tending to show that the defendant himself would have completed the contract within the extension, had he not been interfered with by the government, I will sustain the objection.

MR. RICHARDS: In connection with that, would

(Testimony of Theodore Weisberger.)

Your Honor's ruling be that that is an element he must show?

THE COURT: No, I will pass on that question when I come to it. I want to know what the state of the record is at the present time. I assumed when the witness was testifying to his own ability to complete the contract within the extended time had the government not interfered, and if I am correct in that construction of the testimony this cross examination is proper.

MR. RICHARDS: Well, if the Court please, I would like to pursue this course in regard to this matter, that for the time being to allow the testimony of Mr. Weisberger to stand as evidence of the physical ability to do the work, with the privilege, after giving it further consideration, of introducing further testimony on his financial ability to complete the contract?

THE COURT: With that understanding I will sustain the objection then.

MR. WILLIAMSON: No further cross examination, then, Your Honor, until counsel announces his final position upon this point.

RE-DIRECT EXAMINATION.

Q. (Mr. Richards) Mr. Weisberger, Mr. Williamson asked you in regard to the plan of manufacture which was embodied in your application for change, and you stated that it was the manufacture of the shape in the canal. Did the government after it took over the work do any of it in that manner?

(Testimony of Theodore Weisberger.)

MR. WILLIAMSON: We object, Your Honor, to the question as not proper re-direct.

THE COURT: If the government did the work it may be material in some phase of the case. You may answer the question.

A. Yes, there was quite a bit of it.

Q. Do you know what part of it?

A. All the Trail Creek tunnel—

MR. WILLIAMSON: Your Honor, we agreed to stipulate as to the changes.

THE COURT: Yes, but I did not know whether you had entered into that stipulation yet or not.

MR. RICHARDS: It has not been put in shape yet.

THE COURT: Don't enter into anything that will be covered by the stipulation.

MR. RICHARDS: No. I did not intend it for that purpose. I simply wanted to show that in connection with his application, that that was the feasible way to construct portions of the canal. I did not intend to go into it to any extent in his case.

MR. WILLIAMSON: We will withdraw the objection.

A. Trail Creek tunnel was lined with monolithic lining; that is, the concrete was cast in place in the tunnel, in shapes they made.

Q. Was there any other part that you know of?

A. Not that I know of of my own knowledge.

Q. Mr. Williamson asked you if you ever made any forms for manufacturing tunnel shapes, or any

(Testimony of William L. Dimmick.)

tunnel shapes, and you said you did not. Was there any tunnel ready to line in the season of 1907?

A. There was none ready and from the progress of the work it was very apparent that there would be none ready until late the following season, with the exception of a very small tunnel, called Columnia tunnel, and therefore we concentrated our efforts on getting the methods of manufacture of the open canal shapes out first before bothering with this work for which the government was not ready.

Q. So that at no time in the season of 1907 was there any demand or use for the tunnel shapes?

A. None, with the exception of this small tunnel, called Columnia tunnel.

Q. Well, the rest of the canal was not lined that season down to that tunnel, was it?

A. No.

MR. RICHARDS: That is all for the present.

(Witness excused.)

WILLIAM L. DIMMICK, produced as a witness on behalf of defendants, having been first duly sworn, testified:

Q. (Mr. Parker) Where do you reside?

A. I live at 106 North Seventh street, North Yakima, Washington.

Q. Are you acquainted with Theodore Weisberger, the defendant in this case?

A. I am.

Q. How long have you known him?

(Testimony of William L. Dimmick.)

A. Why, I have known him for something like six or seven years or eight years.

Q. Were you employed by Mr. Weisberger in the spring of 1907 to do any work?

A. I was.

Q. What work were you employed to do for Mr. Weisberger, the defendant?

A. I was employed to freight his material from Naches City to the points of construction on the Tieton canal.

Q. About when did that employment begin?

A. Why, as soon as the roads—as it was possible to freight over the roads, or as soon as we could get in with our loads. We were supposed in his first agreement that we should commence in March.

Q. Of what year?

A. 1907.

Q. Did you commence at that time to transport freight from Naches City to Tieton canyon?

A. We did not.

Q. Why was the work not commenced at that time?

MR. WILLIAMSON: We object to that question, if your Honor please, first upon the ground that this is testimony apparently going to impeach the right of the Secretary of the Interior to suspend this contract; and, second, upon the ground that whatever right can be claimed now upon the road matter is shown by the testimony to have been waived.

THE COURT: I will overrule the objection. I

(Testimony of William L. Dimmick.)

think all the circumstances have to be taken into consideration.

A. The roads were not in condition. We had a very heavy fall of snow that season and the roads were not in condition so that we could commence that soon.

Q. When did you first commence transporting freight from Naches City to Tieton Canyon for Mr. Weisberger?

A. I think our first loads went out in April, if my memory serves me right, but only a portion of the way up. It was twelve miles from Naches City to the Hutton place and there is where I think our first loads were hauled.

Q. Do you remember about what time in April that was?

A. Well, we hauled considerable steel to that point in April—several weeks there.

Q. Do you know at what time the freight was finally transported to Weisberger's camp? I mean the first loads.

A. I think it was some time in May. No machinery or freight of that kind. We might have went through with a few loads in May—I think we did—of light material for camp purposes and such as that—that is, lumber for camp purposes.

Q. In May, 1907?

A. May, 1907.

Q. Now about when was any freight shipped or steel first transported over the road?

(Testimony of William L. Dimmick.)

A. I think it was June. If my memory serves me right, about the middle of June.

Q. What freight in the way of machinery was transported during the month of June?

A. I think the first heavy machinery that went clear in was a motor. We started with a rock crusher before, but never got in with it.

Q. Why didn't you get in with the rock crusher?

A. The roads wasn't so constructed that we could haul a heavy piece of machinery there. It weighed something like seven tons, between six and seven tons, and we wasn't able to get in there.

Q. How near the Weisberger camp did you get with the rock crusher at first?

A. It was what was known as "Old Camp 3." I think it's about five miles, if I remember, or six miles, from the camp.

Q. What happened when you got there?

A. The roads were newly constructed and were soft and it simply went down to the axles; the wheels of the machinery dragged on the ground until we got plank under it and got it out and it was **not** possible to take it any further.

Q. Was that rock crusher subsequently taken in?

A. Yes, sir.

Q. How long after that time?

A. It was some three or four weeks; if I remember (I have forgotten the exact date) it was somewheres about the 24th of June—no, it was a little earlier than that.

(Testimony of William L. Dimmick.)

Q. Would it have been practicable to have transported or moved that rock crusher over that road prior to the 24th of June, 1907?

A. I don't think it would. I think that we moved it a little sooner than that, probably the 20th. Well, the way I remember the date was, some of our teams was taken away at that time and I remember particularly they were there the 24th of June; they left that particular point at that time; it was before that time.

Q. Did you assist in hauling any shapes or forms for the casting of concrete from Naches City to the work?

A. Yes, sir.

Q. What difficulties, if any, did you encounter in the road in transporting those shapes or forms?

A. The forms, when they were assembled, were something like eight feet wide, and the road, the new part of the road, say from Camp 3 on up, or the portion of it especially after they crossed Trail creek, was narrow; there was a heavy grade made, a change from the old road from which it was originally constructed in the fall and they made a new grade and kept on the south side of the river and their grades were very narrow; in places our wagon wheels, only seven or eight feet width, would be simply on the edge of the embankment, and the road was new and soft; it was very dangerous; we often had to take off our leaders—we used four-horse teams, we often had to take off our leaders and have extra men

(Testimony of William L. Dimmick.)

there from Mr. Weisberger's camp or a crew of men that was working on the road and the ditch above, at times to hold onto our wagon until we got^d by.

Q. What, if anything, was done about the transportation of the forms after you experienced that difficulty? Did you continue to haul them or were they changed in form in some way?

A. We only hauled what was already assembled, I think. When we saw the trouble there was we assembled them on the works instead of Naches City.

Q. Now, while you were at this freighting, Mr. Dimmick, was the road obstructed at any time by the work of the government?

A. They were obstructed at times.

Q. In what way?

A. They were excavating the canal on the south side of the river and the dirt that was thrown out of the canal, excavated out of the canal, simply went into the road and at times the road was blocked altogether; that is, it was a great deal more difficult, and the road was gradually carried into the river. That was at times; there was usually certain times of the day that we could get by.

Q. State, if you know, whether any blasting was carried on at that time.

A. Yes, sir. Where the rock work was there was blasting at all times—Oh, I don't say all times, but they had certain times to blast—when they set off their blasts, you know.

(Testimony of William L. Dimmick.)

Q. Was this blasting being done by the government in excavating for the canal?

A. It was done by the government in excavating for the canal.

Q. Did you transport some cement from Naches City for the work for Mr. Weisberger?

A. Yes, sir.

Q. When was that done?

A. I think it was in June—I am sure it was.

Q. June of 1907?

A. June of 1907.

Q. What kind of teams or outfit did you use, Mr. Dimmick, for that work?

A. The most of our teams were heavy teams, weighing from fourteen to sixteen hundred. We had some light teams.

Q. How many teams, all told, did you use on the work?

A. We had that season nine four-horse teams.

Q. Had nine four-horse teams?

A. Yes. That is, Mr. Carey was helping me in the work.

Q. Mr. Carey was helping you with the work?

A. He was interested to a certain extent in the work.

Q. Mr. Frank Carey?

A. Mr. Frank Carey.

Q. Now how many pounds of cement could each team haul at a load?

A. We have hauled as high as—after the roads

(Testimony of William L. Dimmick.)

were settled and all we would haul as high as seventy sacks of cement; as a rule about sixty—from sixty to seventy sacks when the road was settled.

Q. And a sack weighs how much?

A. Almost a hundred pounds; one or two pounds short of a hundred, maybe three pounds.

Q. And how many days did it require for a team to make a trip between Naches City and the canyon?

A. Two days to where his first camp was located.

Q. Now with the outfit of wagons and teams you had on the work, Mr. Dimmick, how long would it have taken you to transport from Naches City to Weisberger's camp, where this cement was being used, two hundred and seventy-two thousand pounds of cement ?

A. It would depend some on the conditions of the road. Ordinary conditions we would not consider less than fifty-five sacks to the load; that would be ninety-seven or ninety-eight pounds to the sack; we usually considered fifty-five hundred to a load—fifty-five to sixty hundred to a load; some teams were loaded heavier than others.

Q. Then it would have required, perhaps, fifteen or eighteen days to have transported that amount of cement?

A. On that basis, yes. I have not figured it up.

Q. After January 1st, 1908, or after February 1st, 1908, did you continue to transport freight from Naches City to the Tieton canyon?

A. Yes.

(Testimony of William L. Dimmick.)

Q. For whom was that work done?

A. Why, I continued to handle all of the government freight, both the Weisberger work that they had taken over and also the Reclamation freight which I had been transporting for something like a year.

Q. When did you commence transporting freight from Naches City to the Tieton canyon for the government in the spring of 1908, about what time?

MR. WILLIAMSON: We object to that, if your Honor please, as immaterial and irrelevant.

THE COURT: It may become material. You may answer the question.

A. It was in February, the first part of February, if I remember right.

Q. And did you continue to haul cement into the canyon during the summer of 1908?

A. I did. Not continuously, of course. We put in some in February, if I remember right it was something like fifteen days, or something like that, in February that we hauled cement in, and we discontinued then for a period and commenced again in the summer.

Q. And in the summer you hauled in more?

A. Yes, sir.

Q. Do you know whether the cement you hauled in was used in the construction of forms for the canal or shapes for the canal?

A. It was.

Q. About when did you haul the last cement to the Weisberger camp for the government?

(Testimony of William L. Dimmick.)

MR. WILLIAMSON: We object, Your Honor.

THE COURT: It seems to me the time it took the government to complete this contract is rather immaterial.

MR. PARKER: It is for the purpose, if the Court please, of showing about the time this work was completed.

MR. WILLIAMSON: It is in the record, I think, Your Honor.

THE COURT: Yes. I think it was testified it was some time in November, was it not, 1909?

MR. WILLIAMSON: November 10, 1909, I think. It is stated in the complaint and also in the testimony.

MR. PARKER: If it is in the record, then I will withdraw that question.

Q. Now you say you commenced to haul freight for the government early in February, 1908.

A. Yes, sir.

Q. Did you haul continuously from that time until the work was completed?

A. No, sir.

Q. About when did the suspension of freighting come?

A. Why, if I remember right, we hauled about fifteen days in February.

Q. And when did you next resume work?

A. I think it was in May, the forepart of May sometime.

Q. Then in the month of February you worked

(Testimony of William L. Dimmick.)

about fifteen days for the government and did not do any more freighting until along in May?

A. Not with reference to that work, the Weisberger work. I don't think we put in any more cement in there until some time in May, into the canyon. Why I say that, we were freighting continuously for the government on another contract, and when I say we didn't freight any more I simply mean we did not on that particular contract, but we were freighting continuously for the government on another contract.

CROSS EXAMINATION.

Q. (Mr. Williamson) You are pretty well acquainted with mountain roads, Mr. Dimmick.

A. Yes, sir, some.

Q. Was that an ordinary mountain road?

A. When it was completed you mean? At the present time or when I was freighting over it?

Q. When you were freighting over it.

A. When it was completed it was an ordinary mountain road, yes, sir.

Q. Fifty-five sacks of cement is a fairly good load, is it not?

A. Why, it depends on—

Q. For a mountain road.

A. For a mountain road? It depends on things that way. We have hauled into Bumping lake a great deal more.

Q. Well, taking into consideration that road your ability to haul two hundred and seventy-two thousand

(Testimony of William L. Dimmick.)

pounds of cement in fifteen days does not indicate to you the impossibility of passage on the road, does it?

A. Will you repeat that again, please?

Q. I say taking into consideration the fact you testified to as to your ability to carry two hundred and seventy-two thousand pounds of cement over a road a distance of twelve or fifteen miles in fifteen days does not speak very badly for the condition of the road, does it ?

A. No, sir.

THE COURT: I do not think it requires very much explanation to make this jury understand what is meant by a mountain road. I think most of them have seen one.

Q. When did you do your last hauling in 1907 for Mr. Weisberger?

A. I think it was in November; if I am not mistaken the first of November.

Q. You stopped hauling cement and steel about the first of November?

A. Yes, sir.

Q. Did you do any hauling for Mr. Weisberger through November and December and up to the first of February?

A. I think we did the first of November, but not after that. Let me see; the last hauling we did, I wouldn't say now just exactly the date, but we put in some steel into camp 1. When we speak of a mountain road—that's nineteen miles up the canyon,

(Testimony of William L. Dimmick.)

it makes quite a difference; now the road was fairly good into Camp 1, and we put in some steel into Camp 1 a little later probably than October—I'm not sure when.

Q. A road of that kind, Mr. Dimmick, is more passable in the winter time, is it not, than in the summer—so considered? Don't you do your heavy freighting in the winer time to a large extent?

A. No, sir, we never found it so. There is certain times in the winter time you can do freighting, but there are other times it would be almost impossible on account of the deep snow and being soft.

Q. Is not the reason you quit work for Weisberger in November on account of weather conditions?

A. At that time of the year it was muddy and bad on the upper end of the road.

Q. And you quit freighting on that account?

A. We was not required to. He never gave us orders to freight at that time; we only had a large tent to place cement in and there was quite a large amount of cement in the tent and I didn't understand they needed any more after that time.

Q. Did Mr. Weisberger request you to haul any more cement after the 1st of November until the 1st of February?

A. I don't recall that he did.

Q. Don't recall that he asked you to at all?

A. No, I do not.

Q. Feel pretty sure of that, Mr. Dimmick?

A. Yes, sir, I am sure.

Q. You got no request to haul any for him?

(Testimony of William L. Dimmick.)

A. No.

Q. Did you haul any for the government during those months—do any freighting for the government during those months?

A. We freighted into Camp 1, and I believe a carload of dynamite went into Camp 2.

Q. During those months?

A. During those months. Camp 1 has a comparatively good road; it would hardly be considered a mountain road into Camp 1. We freighted there all winter, that was our contract.

Q. Your difficulty in crossing this grade that you spoke of where your wheels were close to the edge, was due to the fact, was it not, that you had an eight-foot form across your wagon, rather than to the fact the road was so narrow that an ordinary wagon would slip off?

A. There was part of the time that was so: A part of the time it was on account of the dirt coming off down and filling up and making the road narrower than it should have been.

Q. Your delays from construction were merely temporary?

A. Temporary to a certain extent, yes, sir.

Q. And you actually found no difficulty from slipping off these grades when you carried the forms knocked down?

A. No, sir.

Q. You could carry more forms knocked down than you could in place on one wagon, couldn't you?

(Testimony of William L. Dimmick.)

A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. (Mr. Parker) Mr. Dimmick, are you familiar enough with this map to indicate the point to which the road was completed, to the camp which you referred to as Camp 1?

A. To which the road was completed?

Q. Yes, to Camp 1.

A. At what time?

Q. Well, at the time you took the first load. Well, indicate Camp 1 there first, if you can. That is the best way to get at it.

A. Camp 1 would be right in here (pointing on map on the wall) some place. This (pointing) is Camp 1; that (pointing) is Camp 2.

Q. That is the point to which you say you freighted during the winter?

A. Yes, sir.

{ Q. Now where is Camp 2, the next camp up? Can you indicate where it is located?

A. This is it, I guess (pointing). I am not familiar with the map.

Q. This is Camp 2 up here (pointing on the wall map), is it?

THE COURT: You can point it out yourself, Mr. Parker.

Q. Now can you point out the location of Camp 2, Mr. Dimmick?

A. This is Camp 2 (pointing), right here.

(Testimony of William L. Dimmick.)

Q. You say you were able to come up to Camp 1 during all the winter?

A. Yes, sir.

Q. Now about what time was it before you were able to reach Camp 2?

A. That spring?

Q. Yes, the spring of 1907.

A. Well, we pulled the rock crusher just above here in sometime the latter part of May, or middle of May, if I remember right.

Q. In 1907?

A. In 1907.

Q. You pulled that a little above Camp 2?

A. Yes, sir.

Q. Where was Mr. Weisberger's camp at that time?

A. He would be about this place (pointing on map), somewheres up in here.

Q. Now, when in the spring or year of 1907 was the road completed to Weisberger's camp so you could get over with freight wagons?

A. In 1907?

Q. Yes.

A. In May there was teams crossing there, possibly in April—I think there were a few teams went up in April, but it was on the side of the hill and there was times that the road would slide on them—the snow was melting on the side of the hill and would slide in, so a man might get over it with a light wagon in April even, but in May was the quickest

(Testimony of William L. Dimmick.)

the road was ever—the road was never completed to Mr. Weisberger's camp until the latter part of May or first of June—I think it was the latter part of May that the road was completed so a man could haul in even light stuff to any load. A man might go over with a very light load.

Q. Do you know whether or not the government completed the road above the Weisberger camp to the head of the ditch?

A. It is pretty hard sometimes to designate the difference between a road and a trail. We hauled some cement to the head gate of the ditch, but it was not possible for us to haul a full load in there.

Q. Now when was that cement hauled to the head of the ditch or to the diverting dam, I believe it is called?

A. If I remember right it was hauled in 1908.

Q. Now then up to the time that Mr. Weisberger left the work, or the time that the government took it over, was there any road over which wagons could pass with a load from his camp to the diverting dam?

A. They went through there with wagons, but I don't think it was possible to haul any loads, heavy machinery or anything like that, only light loads.

Q. Now as a matter of fact didn't they go along the excavation made for the canal before they—

A. Before the forms were laid?

Q. Before the forms were laid.

A. It seems to me that is the way they did go up

(Testimony of Frank Carey.)

there. They followed right through the canal for a ways.

Q. (Mr. Williamson) Did you ever fail to get any cement into the canyon when Mr. Weisberger ordered it in?

A. Not to my knowledge.

Q. You got it there as soon as he wanted it?

A. We might have been temporarily delayed for a few hours, or something like that—teams on the road or something like that.

(Witness excused)

FRANK CAREY, produced as a witness on behalf of defendants, having been first duly sworn, testified:

Q. What is your name?

A. Frank Carey.

Q. Where do you reside?

A. 308 South Sixth Street.

Q. Are you acquainted with the defendant, Theodore Weisberger?

A. Yes, sir.

Q. How long have you been acquainted with him?

A. About five years.

Q. Have you at any time been employed by Mr. Weisberger to perform any work or do any freighting for him?

A. Yes, sir.

Q. When was that?

THE COURT: Does the government expect to offer any testimony in opposition to that given by the last witness?

(Testimony of Frank Carey.)

MR. WILLIAMSON: I don't think so, Your Honor. I did not consider it from that standpoint.

THE COURT: I assume this witness is going to cover the same ground as the testimony of the last witness.

MR. PARKER: Practically the same ground. There are probably two or three facts we are going to bring out from him that were not covered.

MR. CAIN: I do not think we will controvert any of the testimony of Mr. Dimmick.

THE COURT: Let the record show that it is admitted that this witness will testify to the same facts as the other.

MR. PARKER: Just one or two other facts I want to show by him that Mr. Dimmick did not testify to.

THE COURT: Yes.

MR PARKER: I will put them in first until the stipulation can go in.

Q. (Last question read.)

A. 1907.

Q. About what time in 1907 were you first employed by Mr. Weisberger?

A. April, 1st of April, I think.

Q. Now what was the first work that you did for him?

A. Excavating the power house ditch.

Q. Now can you indicate upon the map about where the power house ditch is located that you assisted in excavating with reference to Mr. Weisberger's camp?

A. I think there (pointing on wall map) is the

(Testimony of Frank Carey.)

camp; about here (pointing); I should judge along in here some place.

Q. Now you say you commenced that excavation at what time?

A. Along the 1st of April.

Q. How long did you continue to work?

A. At that excavation?

Q. Yes.

A. I think it was in the neighborhood of thirty—I think it was just thirty-one days I worked for him.

Q. On the excavation there?

A. Yes, sir.

Q. Now was that prior to the time the freighting begun?

A. Yes, sir.

Q. Now on which side of the river was the power house and the canal constructed by Mr. Weisberger located?

A. The power house was on the north side of the river.

Q. On which side of the river was the road?

A. On the south side.

Q. Was there any bridge at the time you went there crossing the river and giving access to the road on the south side?

A. No, sir.

Q. What if anything was done about the construction of a bridge there?

A. Why, later on Mr. Weisberger constructed one.

Q. What kind of a bridge was it, how long?

(Testimony of Frank Carey.)

MR. WILLIAMSON: We object to this testimony as irrelevant and immaterial. The contract provides that the contractor must build and maintain his own roads.

After discussion by counsel.

THE COURT: You may answer the question.

A. As near as I remember it was about a hundred feet.

Q. And how was it constructed?

A. I hardly know how to answer that question.

Q. Out of timbers or frame?

A. Timbers, yes, sir, frame bridge.

Q. Where were the timbers procured?

A. They got the timbers right there in the timber. They were hauled there. I hauled them there from the hills.

Q. You cut them there in the vicinity and hewed them out?

A. They did, yes, sir, but I hauled them.

Q. What was the condition of the snow at that time in the canyon?

A. When I went there?

Q. Yes.

A. Well, there was probably a foot or sixteen inches of snow around there.

Q. Did you have any difficulty in crossing the river?

A. I did.

Q. What was the nature of the difficulty, what was the trouble?

A. The road was on the south side of the river and

(Testimony of Frank Carey.)

the ditch was on the north and my stock was on the north side of the river; in order to get over there I would go to Naches every Sunday and get feed for my stock, and in order to get across there I had to cross the river; so one day I drowned one of my horses there in crossing the river.

Q. Did you frequently have trouble there?

A. Well, it was very deep there and swift. I came pretty near getting drowned myself, I know that.

Q. Now, Mr. Carey, you remember the time that Mr. Weisberger's contract was terminated?

A. Yes, sir.

Q. After that time did you do any work for the government?

A. I did.

Q. Were you familiar with the equipment and material that Mr. Weisberger had on this job?

A. Yes, sir.

Q. Now you may state, if you know, what disposition was made of portions of that equipment and material.

MR. WILLIAMSON: We want our general objection to cover this question, Your Honor.

THE COURT: Yes.

Q. I am referring now to the steel rails. Do you know of any disposition having been made of any of them?

A. Why, I hauled some of them out of the canyon, yes, sir, to Naches City.

Q. After the work was done by the government?

(Testimony of Frank Carey.)

A. Yes, sir.

Q. And what disposition was made of the rails you hauled out after that?

MR. WILLIAMSON: This is *res adjudicata*, if Your Honor please, in addition to the other objections. This court has passed upon that matter.

MR. PARKER: It is the purpose of this testimony, if the court please, to show that after this work was done a lot of this equipment that was furnished by Mr. Weisberger and taken over by the government was transferred to other projects and used by the government. It goes to sustain our counterclaim.

THE COURT: I will overrule the objection for the present.

Q. What disposition, if you know, was made of the steel rails after you returned them to Naches City?

A. I hauled them to Naches City and at the time they wanted me to take them from Camp 4 to Bumping lake, to a dam up there, but I told them I didn't have the time. They was unloaded from my wagons to other wagons and I saw them started up the way to go there over the hill, but I didn't see them taken clear there.

Q. Do you know of any disposition of the dump wagons taken by the government?

MR. WILLIAMSON: May I ask him one question?

MR. PARKER: Yes.

Q. (Mr. Williamson) What is the time you are testifying to? What time was it?

A. At what time were those rails—

(Testimony of Frank Carey.)

Q. At what time, what year, what day, what month?

A. Well, the rails were hauled from the canyon down to Naches in the year of 1909.

MR. WILLIAMSON: I renew my objection if Your Honor, please. Whatever took place after this contract was suspended has no materiality here. The value would be as of the 1st of February, 1908.

THE COURT: The defendant has offered no evidence of the value. I overrule the objection.

Question read. "Do you know of any disposition of the dump wagons taken by the government?"

A. Yes, sir.

Q. (Mr. Parker) Well, state what you know about it.

A. In 1909 I hauled out the dump wagons, several of them, from the canyon down to Naches City, and there they were used for hauling gravel up on the Tieton project by the government.

Q. Was that in any way connected with the Weisberger work?

A. Not to my knowledge.

Q. State, if you know, whether any of those wagons were taken to Bumping river lake.

A. Yes, sir.

Q. What about that?

A. I can't say how many there were. They were all numbered one, two, three, four, five, six, seven and eight, and I see some of the same wagons up there, and I spoke to Mr. Tucker one time and says, "What

(Testimony of Frank Carey.)

are Mr. Weisberger's wagons doing up here?" He says, "I don't know. They were sent up here by the government for us to use," and later in the fall they were sent out by me, I hauled them down to Naches City.

Q. Any other material? Burlap, for instance?

A. Yes, sir, there was some up there I hauled from Weisberger's camp to the site of a pipe plant they had across the river and charged to Weisberger's account. I was hauling on the Weisberger contract and I did that myself that summer, and then afterwards, during the summer, I hauled some burlap from this camp down there and also taken them across the river to this pipe plant and it was also charged to the Weisberger contract and paid to me by the Weisberger contract.

Q. You say this stuff was hauled from Naches City over to a camp they had near Naches City?

A. Yes, sir, I do.

Q. What was the nature of the work being carried on there at the camp near Naches City?

A. Making concrete pipes for the Tieton hill.

Q. Where is the Tieton hill located with reference to the Weisberger road; is that part of the Weisberger road?

A. Well, not to my knowledge. It could have been, of course, but not to my knowledge. They claimed it was government use.

Q. Then do I understand you that this pipe was being manufactured for use in the lower end of the ditch?

(Testimony of Frank Carey.)

A. No, sir. For those laterals running up the hill.

Q. What hills now?

A. On top of the Naches, up on the Tieton.

Q. That was several miles from the location of the Weisberger work?

A. Yes, sir.

Q. Now you say when this burlap was hauled over to that camp it was billed out as Weisberger freight?

A. I do.

Q. And in bringing the rails down from Bumping river to Naches City how was that billed?

A. That was the government's own—

Q. How?

A. From Bumping lake it was billed out as government freight, but coming from the Tieton river to Naches it was billed out as Weisberger freight.

Q. And the same material was transported on down to the camp down below Naches City?

A. Yes, sir.

CROSS EXAMINATION.

Q (Mr Williamson) Mr. Carey, do you know of your own knowledge whether the equipment which you speak of was equipment taken over by Mr. Weisberger or from Mr. Weisberger or equipment purchased by the government subsequent to the suspension and used upon this work?

A. No, sir.

Q. You do not know?

A. No, sir.

MR. WILLIAMSON: That is all. I move to

(Testimony of Frank Carey.)

strike the witness's testimony upon the ground that Paragraph 2 provides for two propositions; one is that we can take over and use on the work material which he had purchased and was using, or which he might have on the ground for his own use, or we might purchase other materials and charge the same to the contractor.

THE COURT: The testimony of this witness does not amount to anything unless it is connected up.

MR. WILLIAMSON: It is absolutely immaterial so far.

THE COURT: Unless it is connected up of course it would amount to nothing.

MR. PARKER: Now then, it is understood, if the Court please, that this witness would give the same testimony as to the condition of the road at the time of its completion as given by the preceding witness, Mr. Dimmick?

THE COURT: That is my understanding.

MR. WILLIAMSON: Yes.

RE-DIRECT EXAMINATION.

Q. (Mr. Parker) Now, Mr. Carey, in answer to the last question of counsel, whether you knew this equipment to which you have referred was equipment taken over from Mr. Weisberger or purchased by the government subsequent to the termination of his contract, you answered that you do not know. Now do you know whether or not any of it, any of the equipment, was the same taken over by the government?

(Testimony of Frank Carey.)

A. Why yes. I probably answered the other question a little wrong. The dump wagons was Mr. Weisberger's; that is, that was my understanding in the beginning.

Q. You knew those as the wagons of Mr. Weisberger?

A. Yes, sir.

Q. And as to the other stuff?

A. I couldn't say whether the government bought it, but I hauled it down the canyon out of the Tieton to Naches and it was charged to Mr. Weisberger's account.

Q. (Mr. Williamson) How do you know it was charged to Mr. Weisberger's account?

A. I hauled them in there at the time and they said they were for Mr. Weisberger.

Q. What became of those dump wagons you saw?

A. I hauled some down the canyon, down to Naches, and afterwards they were taken to Bumping lake.

Q. Did you take them to Bumping lake?

A. Yes, sir, I did, one of them.

Q. How many?

A. I taken one in myself.

Q. That you are sure of?

A. Yes, sir, the same number.

Q. Is there any way that you can identify them as the same wagons?

A. I could by the numbers. They were numbered from one to eight, all numbered the same.

(Witness excused)

MR. RICHARDS: Before we adjourn I want to

(Testimony of H. J. Doolittle.)

put in evidence this paper from the Secretary of the Treasury. It should have gone in as part of the other testimony.

MR. WILLIAMSON: No objection.

THE COURT: It will be admitted and marked as an exhibit.

Paper writing referred to offered and received in evidence and marked as Defendants' Exhibit "P".

Thereupon, after the usual caution to the jury, the court ordered a recess till 2 o'clock the same day.

AFTERNOON SESSION.

2 p. m. Feby. 21, 1912.

All present as at the morning session; continuation of proceedings pursuant to recess as follows: to-wit:

H. J. DOOLITTLE, produced as a witness on behalf of defendants, having been first duly sworn, testified:

Q. (Mr. Parker) What is your name, Mr. Doolittle?

A. H. J. Doolittle.

Q. Where do you reside?

A. 313 North Naches.

Q. North Yakima?

A. North Yakima.

Q. What is your business, Mr. Doolittle?

A. Civil engineer.

Q. Were you engaged in such business in the years 1906 and 1907?

A. I was.

Q. At what place?

(Testimony of H. J. Doolittle.)

A. The Tieton canyon.

Q. In whose employ were you at that time?

A. United States Reclamation Service.

Q. Are you familiar with the work undertaken or contracted for by Mr. Weisberger on the Tieton canal?

A. I am.

Q. Did you at any time locate any road up the Tieton canyon in the vicinity of this work?

A. I did.

Q. I wish you would refer to the map on the wall—

MR. RICHARDS: That map ought to be identified.

(The map referred to was thereupon marked by the clerk as Defendants' Exhibit "Q".)

Q. —marked Defendant's Exhibit "Q" and state whether it represents approximately the location of the Tieton canal as constructed by the Reclamation Service and the roads and the river.

MR. WILLIAMSON: We admit that, Mr. Parker.

A. That is my recollection of that canyon.

Q. Now can you indicate upon the map, Mr. Doolittle, about the points you located the road?

A. Well, I think that is correct (showing) up as far as there—this line here (showing on Exhibit "Q"); then we cross to this other side at this point on this original survey—

MR. RICHARDS: Pardon me a moment, Mr. Doolittle. Please refer to something there at those points so as to make it intelligible in the record.

A. (Continued) Well, opposite Trail creek; the

(Testimony of H. J. Doolittle.)

original survey was on the opposite side of the river there; there was a very low bank along here and the original survey was put over there to avoid that creek.

Q. It was put on the north side of the creek to avoid a rough bank on the south side of the river?

A. Yes, sir.

Q. Go on.

A. Now as I recall it seems to me we kept on that side until we got up to here (showing). I don't remember about this in here (showing) particularly, but I remember distinctly that the original survey was on the north side at that point.

Q. Now that point is opposite the power house, is it?

A. That is past where the power plant is located.

Q. On which side of the river was the power plant located?

A. On the north side. What we called the Weisberger power plant is on the north side of the river as indicated by this map, and that is approximately right, and then we crossed it at the upper end of that little flat in there.

Q. What flat is that in there? Has it a name?

A. Well, it never had a name, but it's "Power Canal" on this plat.

Q. And just above that you crossed the river?

A. We crossed right through to Sentinel creek.

Q. To the south side?

A. To the south side, and then on the north side from there on up to the diversion works. This (show-

(Testimony of H. J. Doolittle.)

ing on Exhibit "Q") is a little too close to the river here—the canal is too close to the river to permit of a road being up there, but I only remember of going about to there (showing). This part here (showing) was left to later surveys.

Q. Now when was that survey made, Mr. Doolittle?

A. In 1906. I think the early part of 1906.

Q. Now was the road constructed as originally laid out there?

A. Part of it was.

Q. What part was not constructed on the location you made at that time?

A. Well, I was not in on the construction of the road. I was then locating lateral systems, but I know that later on the road was afterwards built on the south side of the river, in many places, and avoided a couple of bridges. At this point here (showing), there were two bridges in there that were washed out by high water, and the line along there was abandoned thereafter, the next spring, the road was put on the south side of the river.

Q. Then the road was changed on the other side of the river opposite the power plant there in the spring of 1907?

A. Yes, sir.

Q. Were you in the canyon, the Tieton canyon, in the spring of 1907?

A. Yes.

Q. What time in the spring of 1907 were you first in there?

(Testimony of H. J. Doolittle.)

A. Well, I went in early; the snow was on the ground, and begun the location of the main canal at the lower end and worked up.

Q. About what time in the spring do you think that was?

A. Oh, that was along—must have been, I should think, about February.

Q. At that time had the road been constructed along there by the government?

A. Well, there was no road to the headworks at that time. You could not get up to the headworks.

Q. I am uncertain whether this was in 1906 or 1907. Do you know, Mr. Doolittle?

A. I located the canal first in sections in 1906 and located that road in 1906, ran this preliminary line, and then early in 1907 (I remember the snow was yet on the ground) I went back and made a relocation for the circular section and I finished that about—I think it was along the latter part—no, about the 1st of April, probably in 1907.

Q. Now, have you had considerable experience in the construction of irrigation canals and like hydraulic work?

A. Well, I have been more or less in touch with that, like all engineers naturally would be.

Q. Now, Mr. Doolittle, as I understand it, a system of construction by lining the canal with shapes, substantially like these (showing) was adopted.

A. Yes, sir.

(Testimony of H. J. Doolittle.)

Q. What can you say as to that being an ordinary and usual method of construction?

MR. WILLIAMSON: I object to that as being immaterial and irrelevant. The contractor has attempted to construct a certain kind of canal under the specifications in the contract; whether it was ordinary or usual would be immaterial.

THE COURT: You can prove it was impossible of construction; whether it is usual or ordinary or not would not be very material.

MR. PARKER: That was the intention in asking the question. Perhaps it might have been put more aptly by one more competent than myself.

THE COURT: Well, you may answer the question.

A. Well, that was a new departure in engineering.

Q. Do you know or have you any record of any other canal having been constructed in a similar manner?

A. I know of none.

Q. Now, Mr. Doolittle, were you upon this work at any time after Mr. Weisberger commenced to lay shapes in the canal in the fall of 1907?

A. I was in there at that time.

Q. What had been done by Mr. Weisberger at that time with reference to laying shapes in the canal?

A. Well, he began—he made an attempt to place some shapes in the canal late in the fall of 1907.

Q. With what result?

A. Well, the work had to be stopped.

Q. Why?

(Testimony of H. J. Doolittle.)

A. Well, at this particular place where the work started it was across a little fill and this material was a little bit unstable, therefore the shapes could not be securely and permanently placed. It was getting along freezing weather and it was impossible to do a satisfactory piece of work.

Q. Do you know whether Mr. Weisberger was required to take any of the shapes out that he had laid?

A. Well, as I remember it there were about ten shapes hauled in there and some of them were placed, but then the next spring they had to be replaced—reset.

Q. Now do you know whether they were taken out and reset that fall?

A. Well, it seems to me that they attempted to, but it was not a success. They had not perfected their device for placing the shapes at that time.

Q. Do you recall any mistake having been made by the rodman or the instrument man working under you relative to grade there that caused them to have to be removed?

A. I do not recall that.

Q. You don't recall that?

A. No, sir.

Q. Now what were the difficulties that you discovered—some of the difficulties that you discovered, making it difficult or impossible to join the shapes properly as Weisberger was laying them?

MR. WILLIAMSON: I object to that, Your

(Testimony of H. J. Doolittle.)

Honor, as immaterial and irrelevant. It is not directed towards any impossibility of construction.

THE COURT: The word "impossible" was used. He may answer the question.

A. Of course on a proposition of that kind, that was a new method and required special machinery and special devices for handling and placing; that naturally resulted in more or less difficulty until the crew could be trained to handle such work as that successfully.

Q. Do you remember what variation was allowed for the joining of the shapes, how many inches or part of an inch was allowed?

A. No, I do not recall that.

Q. Now did you direct the cessation of laying shapes there at any time, Mr. Doolittle?

A. I think I did. I think that I gave the final instructions there to abandon that work that fall.

Q. Well, prior to that instruction being given did you take any action or give any direction to Mr. Weisberger as to the work of laying the shapes?

A. Well, that was under my—I was in charge of the work, and I gave him grade and alignment from which he—

Q. Well, but did you at any time direct the stopping of the work of laying shapes there by Weisberger?

A. That fall we stopped them because they—

Q. Well, did you give him directions to stop the work of laying shapes before November 7, 1907, when the work was suspended, entirely suspended, for that year?

(Testimony of Charles E. Swartz.)

A. I don't remember that.

Q. Now, Mr. Doolittle, referring to the road again. You say that the government did not build two bridges as your location required. State, if you know, whether those bridges were built by anyone.

A. Well, they started to build them.

Q. Who started to build them?

A. The government.

Q. The government started to build them when?

A. In the fall of 1906.

Q. And then they were abandoned?

A. They were washed out by that flood that came.

Q. Now do you know whether or not those bridges located by you, or other bridges to take their places, were constructed by the defendant?

A. No, I don't know about that.

CROSS EXAMINATION.

Q. (Mr. Williamson) Mr. Doolittle, do you know of your own knowledge whether or not the canal was actually constructed with the shapes?

A. It was completed with that type of lining.

(Witness excused.)

CHARLES E. SWARTZ, produced as a witness on behalf of defendants, having been first duly sworn, testified:

Q. (Mr. Parker) Mr. Swartz, what is your name?

A. Charles E. Swartz.

Q. Where do you reside?

A. 404 North First street, North Yakima.

Q. What is your business, Mr. Swartz?

(Testimony of Charles E. Swartz.)

A. I am a contractor and builder.

Q. Are you acquainted with Mr. Weisberger, the defendant in this case?

A. Yes, sir.

Q. Were you employed by him at any time during the year 1907?

A. Yes, sir.

Q. About when did that employment begin?

A. I went up to the Tieton camp on the 16th day of April.

Q. 1907?

A. 1907.

Q. And how long did you remain there?

A. I remained there in his employ until the 15th of August.

Q. At what camp were you located? Was it designated by a number or name?

A. It was at that time called the "Weisberger Camp."

Q. Where was it located with reference to the power house?

A. Well, right across the river from the power house and canal.

Q. Now what was the condition of the roads when you went in there in April, 1907?

A. Well, part of the way the roads was good and part of the way there was no road at all, only just a trail cut through the brush.

(Testimony of Charles E. Swartz.)

Q. How far below the Weisberger camp was the road open or fairly good?

A. Well, I think it was fairly good road up to within about five miles of the camp—something like that.

Q. And from that point to the camp what was the condition of the road?

A. Well, the condition was poor; it was muddy and boggy in places and in places the dirt had slid down into the road off the side hill where they had made some cuts around the hill, and other places there wasn't anything at all only just a trail cut through the brush. There was a good deal of hazel brush in there.

Q. State if you know whether a bridge was constructed by Mr. Weisberger across the Tieton river in that vicinity.

A. Yes, sir, there was.

Q. Can you indicate on the map there (referring to Defendants' Exhibit "Q") about where that bridge was constructed?

A. Yes, sir.

Q. I wish you would, please.

A. It was right at this point, right there (pointing on Exhibit "Q"), just about there.

Q. Can you give approximately the dimensions of that bridge?

A. Yes, sir.

Q. Well, what were the sizes of the bridge?

(Testimony of Charles E. Swartz.)

A. The bridge was a seventy-foot span—a Howe truss span bridge.

Q. Now where was the road, as located by the government, with reference to that bridge?

A. The road up there was on the south side of the river.

Q. Was there at that time any road on the opposite side of the river as shown by that black line on the map?

A. No, sir, not here.

Q. There was no road there?

A. No, sir.

Q. Where was the road subsequently constructed?

A. Right along here (showing).

Q. On the south side of the river?

A. Yes, sir.

Q. Do you remember when that road was constructed?

A. Well, I know when it was finished.

Q. Well, when was it?

A. Along about the middle of June.

Q. Middle of June, 1907?

A. Yes, sir.

Q. Do you know who finished the road?

A. The government, I think.

Q. Do you know whether or not Mr. Weisberger did any work, or caused any work to be done on the road by his men?

A. Yes, sir.

(Testimony of Charles E. Swartz.)

Q. Where was the work done by Mr. Weisberger's men, if you know?

A. Right here (pointing on Exhibit "Q"). This point here is a high bluff for a quarter of a mile, I should judge, as near as I can remember, and right in here (showing) was a little canyon coming down from the south side, and there is a little bridge across that canyon, right there (showing), and just after you leave that bridge there is a short turn, right around here, right at the end of the bridge we built across the river here, and in order to get around with a four-horse team—I had charge of the work there myself, I had nine or eleven men on there for three or four days myself digging that bank down so we could get around there with a four-horse team. We would come up to that point with a four-horse team, by that bridge, and in order to get on the bridge we had to take the leaders off; that is, with a long wagon; with a short wagon you could make the turn.

Q. Now when was it you did the work with Mr. Weisberger's men there?

A. That would be along about the 1st of June—just shortly after we got the bridge completed across the river.

Q. Now did you assist in or were you in any way connected with the manufacture of the forms in which to cast the cement shapes?

A. No, sir, I did not have anything to do with the manufacture. I helped to set up and fill the first few that came up there.

(Testimony of Charles E. Swartz.)

Q. That is, you helped to set up the first forms and fill them with the concrete?

A. Yes, sir.

Q. Now what variation was allowed or what was required by the inspector as to variations in those shapes?

A. Well, the first ones that were made, they exacted the dimensions up to a sixteenth of an inch—the variation was to be not more than a sixteenth of an inch out of radius.

Q. Well, how did you succeed in making them to that close a scale?

A. We didn't succeed at all.

Q. What was the difficulty?

A. Well, the forms as they were made would spring or twist—

MR. CAIN: I don't think there is any dispute about that, Mr. Parker. It has been testified to before, I do not think there is any controversy about it, that variation that was allowed.

MR. PARKER: That is admitted, then, is it?

THE COURT: I understand that is fixed by the specifications.

MR. CAIN: Mr. Weisberger testified to that.

MR. RICHARDS: Well, is it admitted that during the time that Mr. Weisberger was manufacturing shapes that the inspector required them to be built to that radius?

MR. WILLIAMSON: The statement that the witness made was—

(Testimony of Charles E. Swartz.)

MR. RICHARDS: We either want the testimony or an admission that is worth something.

THE COURT: There is no question before the Court.

Q. Was the variation of a sixteenth of an inch changed to a greater variation?

A. Not to my knowledge.

CROSS EXAMINATION.

Q. (Mr. Williamson) Were not forms made by you for the government to comply with that requirement?

A. I think so, yes.

Q. You testified that none were made within a sixteenth of an inch, didn't you?

A. Yes, there were. There were some made there.

Q. Were any accepted by the government that were not made as close as one-sixteenth of an inch?

A. Not to my knowledge.

Q. What date did you say you completed the bridge across the river for Mr. Weisberger?

A. Along about the 20th of May—somewheres along there.

Q. And about that time you began hauling, did you not, to that camp?

A. Shortly after that.

Q. The road was passable for the hauling which you did at that time at that date?

A. Yes.

Q. To that point?

A. Yes, for small loads.

(Testimony of Fred M. Crownholm.)

(Witness excused.)

FRED M. CROWNHOLM, produced as a witness on behalf of defendants, having been first duly sworn, testified:

Q. (Mr. Richards): State your full name.

A. Fred M. Crownholm.

Q. Where do you live?

A. Sunnyside.

Q. What is your occupation?

A. Construction engineer.

Q. In whose employ are you at present?

A. Reclamation Service.

Q. United States Reclamation Service?

A. Yes, sir, United States Reclamation Service.

Q. When did you enter their employ?

A. Why, sometime in February, 1908.

Q. And you first went to work on what project?

A. On the Tieton project.

Q. Had you, prior to going to work for the government, done any work on that project for Mr Weisberger?

A. Yes, I had started work for Mr. Weisberger in the year 1907.

Q. Do you remember when you commenced working for him?

A. April 25, 1907.

Q. Now, Mr. Crownholm, what were your duties when working for Mr. Weisberger?

A. Why, they varied to a considerable extent.

(Testimony of Fred M. Crownholm.)

Q. Just give us an outline of what you first started to do and what you did subsequently.

A. Why, designing chiefly, and after that was under way, why, I took charge of the manufacture and later on the placing of shapes.

Q. Do you remember when you took charge of the manufacture of shapes?

A. No.

Q. You do not remember that?

A. Sometime in July or August. I just forget now when I went up the canyon to arrange for the manufacturing sites.

Q. When were you first up the canyon, Mr. Crownholm?

A. Why, that was the first time I was ever up there.

Q. First time you ever went clear up to the works?

A. Yes.

Q. Who was inspector of the work when you first manufactured shapes?

A. A party by the name of Sells, I think.

Q. Now in order to make the shapes what did you have to manufacture first?

A. Forms.

Q. And what did those forms consist of?

A. O, about seventy-five different parts.

Q. Yes; and they were made of what?

A. Steel.

Q. They were the forms in which the shapes were cast, were they?

A. Yes.

(Testimony of Fred M. Crownholm.)

Q. You made, did you not, Mr. Crownholm, these forms here marked plaintiff's idents. "I", "J" and "K", and these two blocks marked "R" and "R-2"?

A. Yes.

Q. Are those models made like the shapes that were placed in the canal except as to size?

A. Other than that; they are one-quarter scale.

Q. Model "I" represents what shape?

A. The type as shown in Specification 116.

Q. And Model "J" represents what?

A. As modified before and after the suspension.

Q. And Model "K" represents what?

A. That is the same thing.

Q. Now these identifications here, "B" and "Bb" and "C" and "Cc", are they substantially the same as the sides of the shapes as they were designed and manufactured?

A. Yes, practically.

Q. "B" and "Bb" would be under the form as provided in the specifications?

A. Yes.

Q. And "C" and "Cc" under the form as changed and subsequently manufactured?

A. Yes.

(Another model produced by counsel for defendant at his request marked as "Defendants' Exhibit 'S'".)

Q. This Exhibit "S": Would that show substantially the joint you made in the formation of the design "C" and "Cc" if it were taken out?

(Testimony of Fred M. Crownholm.)

THE COURT: Have you been able to agree upon your stipulation, Mr. Richards?

MR. RICHARDS: Yes, but I am identifying these by this man for the purpose of getting them in here. They have never been anything but partially identified.

A. Why, yes.

MR. RICHARDS: We will offer in evidence Defendants' Identifications "I", "J", "K", "R", "R-2", "B," "Bbb," "Ccc" and "S."

THE COURT: They will be received.

Identifications referred to offered and received in evidence and marked with the corresponding letters as exhibits.

Q. Is there any objection, Mr. Williamson, to Identification "Q"?

MR. WILLIAMSON: We admit that it is approximately the map that is shown in the drawing, on a large scale, as we understand it.

MR. RICHARDS: We will offer that in evidence, also.

THE COURT: It will be received.

Identification "Q" offered and received in evidence and marked as Defendants' Exhibit "Q".

Q. Now then, coming back to the manufacture of these shapes, Mr. Crownholm. When you first commenced the manufacture you were building shapes according to the specifications in the contract, were you not?

A. Yes.

(Testimony of Fred M. Crownholm.)

Q. And those were substantially according to Exhibits "I" and the sides "B" and "Bb"?

A. Yes.

Q. What did those specifications require as to the width of the joint between the shapes?

A. One-eighth.

Q. One-eighth inch?

A. Yes.

Q. What did the inspector require as to accuracy as to radius in diameter in manufacturing those shapes?

A. I don't understand your question. You mean variation allowed in the radius?

Q. As to variation allowed in the radius and variation allowed in diameter.

A. One-sixteenth.

Q. When did you first begin casting the shapes?

A. August the 1st.

Q. Now, will you explain to the jury just how that was done; that is, as near as you can without having the forms before you, just the process of making one of those shapes. You might build up your form first and explain the manufacture of the form, and then how the shapes were run in the forms and made. Just give it roughly, of course we can't get mechanical accuracy in a place like this.

A. I made forms from which I cast those small shapes, though they did not resemble those used in any way other than that they were steel. Why, the forms were raised in rows, or a row first from the mixing plant and then filled; then as they were being

(Testimony of Fred M. Crownholm.)

filled reinforcements were put in in accordance with specifications.

Q. What did that reinforcing consist of?

A. O, three-eighths corrugated bars, spaced every four inches.

Q. Those were running through the shapes?

A. Those one-quarter inch rods were run in that direction (showing).

Q. Then did you have any that ran in any other direction?

A. Yes, we had longer rods that went clear around.

Q. Then the shape was reinforced with one around the shape longitudinally?

A. Yes. The rods ran in this (showing) direction and then longitudinal rods.

Q. How many rods were there in each shape?

A. I don't remember.

Q. Did the specifications give the number, if you remember?

A. They show them on the drawings.

Q. When did you manufacture the first shapes, Mr. Crownholm?

A. August 1st.

Q. And when did you commence laying shapes?

A. I don't remember. I can refer to memorandum.

Q. If you have memorandum refer to it.

A. (After referring to memorandum). September the 15th.

Q. Now how many shapes did you lay that fall?

(Testimony of Fred M. Crownholm.)

A. O, possibly thirty or thirty-five.

Q. When you came to lay them what developed as to the character of the canal lining that they made?

A. Why, that question was never brought up before me.

Q. Well, perhaps I do not make myself clear. When those shapes as originally designed, "B" and "Bb" and "I," were laid in the canal, what kind of a lining did they make, those that you laid?

A. Good or bad?

Q. Yes.

A. Why, now that I have had the experience of laying all the rest of the work, I do not think the few I laid then was an entire failure as experience.

Q. Well, did they make a smooth canal lining?

A. Other than as far as the irregularities cause some difference in the diameter of the shapes they did.

Q. There was irregularity in the diameter, was there?

A. There was that allowed by the government in the manufacture of them.

A. And what did that result in as to the joints?

A. Well, it meant that high velocity of water striking that abrupt projection would be disturbed, which would be a bad feature, having the shape itself smooth.

Q. Then the variation necessarily made projections at the joints—they did not come together evenly?

A. Yes, they did not at all times.

Q. Was it possible to make those shapes and

(Testimony of Fred M. Crownholm.)

place them one-eighth inch together and make a smooth joint, or make a one-eighth inch joint?

A. No.

Q. Now do you know whether or not the shapes that were placed that fall were left there?

A. A few of the last ones set were reset.

Q. How much canal was there constructed ready for lining in the fall of 1907?

A. About fifty-eight stations.

Q. How much distance would that be?

A. Fifty-eight hundred feet.

Q. A little over a mile?

A. Yes, sir.

Q. Do you know how many shapes you made altogether that fall before you quit?

A. Thirty-one hundred and sixteen.

Q. What length of canal would thirty-one hundred and sixteen shapes line? How many feet in each shape?

A. Two feet.

Q. Net?

A. That would be sixty-two hundred and thirty-two feet, plus the per cent for the joints. Could I add in regard to that distance of open canal?

Q. Well, whatever there was.

A. There was an addition. The excavation really was completed to a farther point, excepting in the spring of 1908 it was deemed advisable to put in a good deal of drain tile. Whether that would have been

(Testimony of Fred M. Crownholm.)

put in or not the prior year, had we been ready to set shapes, I don't know.

Q. How much more was there?

A. Why, I believe it was opened up clear to Steeple tunnel, excepting at Station 85.

Q. And at Station 85 it was not opened?

A. No. That is where they were considering at that time leaving the canal unlined.

Q. Was the canal completed and dressed and ready for laying shapes clear to Steeple tunnel?

A. At what time?

Q. At the time you were laying there in the fall.

A. I don't remember.

Q. You don't know whether it was or not?

A. No.

Q. The mere matter of going ahead and digging the canal—there had to be other work done on it afterwards to put it in shape to line it, did there not, besides the first excavation?

A. Well, considerable drain tile had to be laid.

Q. And it had to be dressed, too, didn't it?

A. Well, it was generally dressed as far as rough materials were concerned.

Q. The drain tile was laid along the bottom of the canal?

A. On either side, yes, sir.

Q. When did the government commence laying shapes in the year 1908?

A. April the 27th.

(Testimony of Fred M. Crownholm.)

Q. When did they commence manufacturing shapes that year?

A. May the 4th.

Q. Now when the government commenced to lay these shapes was there any change made in the method of joining them?

A. Yes.

Q. What was the change?

A. In jointing the shapes—you are speaking of them after they had been placed?

Q. Yes, after you laid them in the canal, the jointing the shapes together.

A. Why, of course all the shapes laid by—we laid in 1907 were not jointed. We jointed only about half.

Q. But the shapes you laid in 1907 you endeavored to lay according to the specifications with a joint of an eighth of an inch, did you not?

A. We had tried to, yes.

Q. And then when you came to lay for the government in 1908, did you still adhere to that one-eighth joint?

A. No. We were then allowed an inch and a half apart.

Q. That was to overcome this difficulty you have spoken of in joining them so close?

A. It required less care in their manufacture and less care in laying.

Q. And on the angle of that wider joint you could make a smoother surface inside, could you not?

A. Yes. There was as much irregularity in the

(Testimony of Fred M. Crownholm.)

shapes, but it was more gradual, there was less obstruction to the flow of the water.

Q. By that means you would cut out these sharp corners that would cause the eddies?

A. Yes. These points (showing) were farther away.

Q. And also having a wider joint would make a great difference in these shapes being true to radius, would it not? They would not have to be so—

A. Why, no. I can't see that that was any object whatever.

Q. You don't think it was?

A. No.

Q. What degree of exactness of radius and diameter did the inspector require when the government was making and laying these shapes?

A. Why, I don't remember exactly. It was two or three times more than he allowed the contractor.

Q. They increased it two or three times over that allowed Mr. Weisberger?

A. Yes, sir.

Q. And by that increase in that regard and the additional space for jointing you could make them come together better; that is it did not require so much skill and—

A. It did not require the care in dividing that distance. For instance: if one shape was an eighth of an inch small on the diameter and the other one an eighth large, why, it was not necessary to divide that distance equally on both sides.

(Testimony of Fred M. Crownholm.)

Q. And that was the advantage of the wider joint?

A. That was one of the advantages of the wider joint.

Q. Now just step over here and show to the jury what the effect of this variation and the result of trying to bring these shapes absolutely together was.

A. (Illustrating with exhibits). Well, if this was one portion—of course it is harder to make these smaller shapes than it is the larger ones; that is, an error in the scale is more noticeable. Those big shapes were a great deal like these; these are in contact with some of the plates and are an eighth of an inch apart in other places even in this one with small scale; if it was dimensions it would be four times that we could assume.

Q. And these are made of extra fine material; that is, finer material than the regular shapes.

A. It would be easier to make these forms to size than the bigger ones.

Q. You took particular care with these?

A. Yes. You can see these line up quite well.

Q. But in the practical result of trying to cast these shapes and joining them to one-eighth of an inch was that they would come together at some places and would not at others, was it not?

A. Well, this bottom here would be up or down here (illustrating); it was necessary to move the shape in this direction, or this way probably.

Q. And that would throw it out somewhere else?

(Testimony of Fred M. Crownholm.)

A. It meant it would be in contact at some one point and probably out an inch somewhere else.

Q. So it was practically impossible to make them touch all around to an eighth of an inch?

A. It was unless we would have went back to the manufacturing and required a more exact diameter than what was being made.

Q. Which form of this shape is the easier to cast, the one with the smooth ends or the one with these grooved ends, Mr. Crownholm, or is there any difference?

A. Not any if it is to be a smooth end. If you mean a flat end, why—

Q. I mean if you take "B" and "C" and compare them, one being smooth and the other with the grooved end, would it be any more work to cast one than the other?

A. Very, very little, if any.

Q. It would make no material difference?

A. We never noticed any in our manufacturing.

Q. Now how much of the canal did the government line in 1908? Can you tell on this Exhibit "Q"?

A. It was lined to Trail creek tunnel; that is, within one hundred and twenty feet of the upper portal of Trail creek tunnel in the season of 1908.

Q. That was down to this point here (showing on Defendants Exhibit "Q")?

A. Yes.

Q. Marked "Trail Creek Tunnel"?

(Testimony of Fred M. Crownholm.)

A. Yes. All of the joining, however, was not done.

Q. You did not complete the joining of the shapes?

A. No. Thirty days of joining done.

Q. Now in the year 1909 when the government adopted this form of wide joint, what was the method of joining the shapes that it adopted?

A. By covering that portion of the canal between the shapes with a concrete mixture.

Q. That was done after the shape was placed in the canal?

A. Yes, any time after the shapes were placed.

Q. And how was it carried to the place where it was used? Where was the concrete mixed or made?

A. Near the joints.

Q. Then the men carried it and poured it into these joints?

A. Yes.

Q. How did you protect those joints when you poured it?

A. They were covered up and kept wet.

Q. And in pouring you had to put something over the joint?

A. Yes, we had to use a form above the centre of the joint.

Q. In laying these forms in the ground, these shapes in the ground, with the wide joint, what would be the result in regard to the earth and shape settling into the earth and the earth coming up through that joint—would it do that?

(Testimony of Fred M. Crownholm.)

A. No, sir.

Q. It did not do that?

A. No.

Q. What kind of formation were those shapes set in mostly?

A. O, it varied. They were to be backfilled with a mixture of gravel and dirt containing no vegetation.

Q. That is, they were back filled between the lining and the bank you mean?

Yes, and the bottom. Of course there was some dirt at the very bottom on account of the tamping crowding out in between the joints, which had to be cleaned out afterwards.

Q. And those then were filled with the concrete poured in at the bottom—

A. And from the top.

Q. —and then these sides here were protected?

A. Yes.

Q. And the filling put in there and tamped in there?

A. Yes.

Q. Was there a different kind of filling used for the wide joints than was used in the narrow joints, the one-eighth inch joints that were specified?

A. Of material?

Q. Yes.

A. Why, a weaker was used in the wider joints?

Q. You used a coarser material?

A. A coarser material, a greater amount of sand and gravel.

(Testimony of Fred M. Crownholm.)

Q. Now to return to the completion of the canal. This Trail creek tunnel (showing on Exhibit "Q") was not lined with shapes, was it?

A. No.

MR. WILLIAMSON: Is not this all going to the matters we have agreed upon?

MR. RICHARDS: No. I have to ask these questions to bring out what I want to show as to the facts regarding these changes. I understand we will stipulate, if we can get together on that stipulation, that these changes were made. Now that is all that stipulation will cover, as I understand it.

MR. WILLIAMSON: Yes, that is right.

Q. Why was the form of lining of Trail Creek tunnel changed?

THE COURT: That was all covered by another witness and I do not suppose the government disputes it.

MR. RICHARDS: I do not know whether they do or not, and I do not know whether it was ever brought out in the testimony. Of course I don't want to go over and over this stuff any more than is absolutely necessary to get the facts.

THE COURT: I think Mr. Henny testified it was constructed and why it was constructed.

MR. RICHARDS: Perhaps he did.

Q. When was the balance of the canal lined, Mr. Crownholm? Just state the progress that was made.

A. Why, I haven't it all here as to quantities, other than the manufacturing, but of course I can

(Testimony of Fred M. Crownholm.)

show the amount of accepted shapes and when they were made—the number.

Q. Give the date when the lining was finally completed.

A. October the 12th.

Q. What year?

A. 1909.

Q. Who designed the method of joining these shapes that was used by the government, this wide joint—do you know?

A. Why, I was asked—I don't know just who did.

Q. You think you got it up yourself?

A. No; I don't know.

Q. You did, as a matter of fact, most of the inventive work that was done on this job, didn't you, evolving the forms and getting up what could be done? How long have you been engaged in concrete work or working in that line of business?

A. This immediate line?

Q. Well, general engineering, so that you know about—

A. O, off and on for eleven years.

Q. Do you know of any other canal in this country up to the time this was started that had been lined with this form of open shape?

A. No, sir.

Q. So that you had no prior experience to go by?

A. No prior experience.

CROSS EXAMINATION.

Q. (Mr. Williamson): Do you know of any canals

(Testimony of Fred M. Crownholm.)

or concrete work of this kind since this construction work was begun in which the same system was used?

MR. RICHARDS: I do not see that that is material.

THE COURT: The only question is whether or not the construction called for by the contract was possible or impossible. You can ask him the direct question, I presume, as well as to ask him indirectly whether somebody else did it afterwards.

MR. WILLIAMSON: I don't think it is material particularly.

Q. Will you explain your statement regarding the impossibility of joining the shapes as originally designed?

A. Why, in that I meant, of course, that it would be prohibitive cost from my point of view to line it with the one-eighth inch joint; that it was on account of economy that this other joint was adopted and on account of its being more substantial—more practicable.

Q. Was it possible to lay those shapes within the eighth of an inch?

A. If they had been made so they would lay up without having these ends so they would abut on either a curve or a tangent.

Q. Any work which you did while with the contractor, was it then or subsequently accepted by the government? You have stated some fifty-eight stations were lined; was any of that work subsequently

(Testimony of Fred M. Crownholm.)

accepted in the form in which it was done by the contractor?

A. The fifty-eight stations you are referring to was the excavation.

Q. Well, any of the work that was done in laying, was that subsequently accepted?

A. Yes. Well, I don't know whether it was accepted; I do recall it was severely criticized.

Q. Are those shapes still there as part of the present canal?

A. Yes.

Q. As a matter of fact, Mr. Crownholm, was not the difficulty in irregularity due more to defective placing in the canal than to defective manufacturing?

A. Why, experience was what we lacked at the time. A lack of ~~ex~~perience was the reason—

Q. Well, but the irregularities that existed; you said it was apparently impossible for you to put those two shapes together without leaving a little ridge—that is, you could not make an absolutely smooth space; was not the chief difficulty, the difficulty that you encountered, the laying or placing of those shapes in the canal rather than defective manufacture of the shapes?

A. I could not follow any prescribed lines unless the shapes were exact in length. Unless each segment was exactly two feet I could not follow any prescribed lines, because it would throw me off that line, don't you see? if I tried to keep an eighth of an inch joint all around.

(Testimony of Fred M. Crownholm.)

Q. The question of placing the shapes together, however, with the ridge between them, was what you were discussing then, as I understood you. Now that was the difficulty; it was not impossible to construct the canal; it was the difficulty or impossibility of leaving the edge smooth, was it not? Wasn't that your difficulty?

A. Yes; our difficulty, our only difficulties, as I understood them, were to have the work accepted.

Q. Then the question of impossibility was one of relative difficulty, was it not, and how far the government would go in accepting the work?

A. Yes.

RE-DIRECT EXAMINATION.

Q. (Mr. Richards): The purpose of this lining was to give a smooth interior surface to the canal, was it not? That was the purpose of lining the canal, was it not?

A. Yes, though at that time my object was to have it accepted.

Q. Yes, I understand, but the whole plan was and the specifications called for a good job, with a smooth surface, did they not?

A. Yes, sir.

Q. And that is what you had to get in order to comply with the contract?

A. Yes, sir.

Q. The specifications prescribed how the shapes were to be cast, did they not—provided for the method?

(Testimony of James F. Duncan.)

A. Why, I don't remember that feature of it.

Q. (Mr. Williamson): As a matter of fact did not the specifications leave to the contractor, and did not the contractor spend a large portion of his time during the spring in inventing the forms by which you were to form the shapes?

A. Yes.

Q. Referring again to this question of jointing and to your difficulties with the old joints: Wasn't it rather a question of expense than a question of impossibility?

A. Why, there was nothing to pack against, pack the oakum against, when the joint was wider than an eighth of an inch, and we had to fill that whole space up with oakum.

Q. Which was a matter of expense?

A. Which made it a matter of expense, yes, sir.

Q. (Mr. Richards): Well, could you in a wide joint like this on exposed surface, could you have filled that with oakum and then just plastered it on the side and—

A. No. We had to have something to tamp against it. It would have been necessary to have something to make the oakum bind before the mortar could be put on.

(Witness excused).

JAMES F. DUNCAN, produced as a witness on behalf of defendants, having been first duly sworn, testified:

(Testimony of James F. Duncan.)

Q. (Mr. Parker): What is your name, Mr. Duncan?

A. James F. Duncan.

Q. Where do you reside?

A. Thorp, Washington.

Q. Are you acquainted with the defendant, Theodore Weisberger?

A. Yes, sir.

Q. Were you employed by him at any time during the years 1906 and 1907?

A. I was.

Q. When did that employment begin?

A. In the last days of December, 1906.

Q. Where were you employed.

A. At Naches City first.

Q. What did you do for Mr. Weisberger?

A. Why, they established camp up there on the last days of December, and we got our camp fixed up, tents and so forth, and then started construction of a warehouse.

Q. And then what was the next work?

A. Well, after that was completed, or nearly so, I believe—I think we had about finished it—we took a trip up to the Tieton in regard to locating a power house up there.

Q. What time did you go into the Tieton and locate the power site?

A. We made a trip up about the 1st of March, I believe, the first trip.

Q. How did you get in there at that time?

(Testimony of James F. Duncan.)

A. Well, we drive up with a rig, up that far. We went up to one of the Weisberger camps, I don't remember the name of it, the first one, went up there and back; then the next trip we went up—we came back and then went up again later on in March, about the middle of March, I think.

Q. About the middle of March?

A. Somewheres along there, I don't remember the exact time.

Q. How did you get in that time?

A. Well, we drive part way and part of the way we walked in—you couldn't get in with teams.

Q. Who went with you at that time?

A. Mr. Weisberger—do you want the names of all?

Q. I want the names of all of them.

A. Mr. Newenhoff, Mr. Piper, Mr. Bradshaw—I believe that is all that I remember.

Q. Did you have to use snowshoes at that time to go part of the trip?

A. We did when we traveled around—we were obliged to when we got off the trail.

Q. How near to the point where you located the power house could you get a team at that time?

A. Well, I think the first trip it was something like four or five miles, perhaps.

THE COURT: This road has been pretty well traveled over. If there is going to be no conflict in the testimony it seems to me unnecessary to call witness after witness in regard to the road. That is my understanding of what the government says. Two or

(Testimony of William Charles Bunce.)

three witnesses have already been called with regard to the road.

MR. PARKER: The testimony of this witness is largely corroborative. If it is admitted of course—

MR. WILLIAMSON: If you are not attempting to prove any more than what Mr. Dimmick stated I think we are willing to accept that.

MR. PARKER: Well, it was before that time. I do not know though that it is particularly material.

MR. WILLIAMSON: I do not think there is any dispute on that road on any of the evidence that has been presented so far, Your Honor.

MR. PARKER: I think that is all then.

(Witness excused).

WILLIAM CHARLES BUNCE, produced as a witness on behalf of defendants, having been first duly sworn, testified:

Q. (Mr. Parker): What is your name, Mr. Bunce?

A. William Charles Bunce.

Q. And where do you reside?

A. 314 Third avenue, south, North Yakima.

Q. And what is your business?

A. Machinist.

Q. Were you at any time employed by the defendant, Theodore Weisberger?

A. Yes, sir.

Q. Under his Tieton contract?

A. Yes, sir.

Q. When was that?

(Testimony of William Charles Bunce.)

A. I started to work for him on the 14th day of May, 1907.

Q. What did you do?

A. Well we was making forms and the general run of work to do in connection with the Tieton work.

Q. Making forms for what purpose?

A. To make those shapes for the lining of the canal.

Q. Did you have any pattern or anything to go by when you commenced making those forms?

A. Well, not at first, no. We assembled several forms that were not acceptable, as I understood it, and we kept changing them and working over them until such times as we got them right.

Q. How long did you work at those forms before you got a pattern acceptable?

A. Why, I don't know, but it was some little time.

Q. Well, approximately how long?

A. Why, I think I must have been there at least a month before we had one that was the form that they adopted, and still later they made some changes in the way of bracing and the like of that.

Q. Now how many forms did you make at Naches City that were accepted?

A. Well, you mean under the Weisberger contract?

Q. The Weisberger contract is what I refer to.

A. Why we made in the neighborhood of, I think

(Testimony of William Charles Bunce.)

it was, something like two hundred and thirty-five. Of course we didn't assemble them all there.

Q. Do you know about how many were assembled at Naches City?

A. Why, I couldn't say, but not a great many. They had trouble, I understood, in getting them up there on account of being so wide, and we just rolled the angle irons, punched the sheets and got them all ready and sent them up there to be assembled at the canyon.

Q. Now how long did you remain working for Mr. Weisberger at Naches City?

A. Why, I think it was somewheres about the 1st of September, or along about the middle, or somewheres like that, that I went to the canyon from Naches City.

Q. How long did you remain up the canyon after that?

A. We left the canyon, I think it was, on the 20th day of November.

Q. 1907?

A. 1907, yes.

Q. Now, while you were at the canyon what did you do?

A. O, a little of everything in the way of keeping the machinery in repair and keeping the wagons up.

Q. Did you have anything to do in the way of handling the repairs to the forms?

A. Why, yes, a little, but there wasn't much to that, nothing more than probably putting in a rivet or fixing up a brace or something like that that might go wrong.

(Testimony of William Charles Bunce.)

Q. Now, after Weisberger's contract was suspended were you employed by the government?

A. Yes, sir.

Q. In what capacity?

A. Why, the same capacity. I went to work at Naches about—I believe it was about the 14th day of February, 1908.

Q. And how long did you remain in the employ of the government on that job?

A. I remained there until the following year, the 1st of September.

Q. Did you construct other forms for the government?

A. Yes, sir. Made something over—I think something like about two hundred—something like that.

Q. Did you construct any other forms for the government aside from those to make the shapes for the open canal?

A. Yes, I made those in the tunnel as well. Made them tunnel shapes first, and I made them in such a way that they could be taken apart, the angles cleaned out and then make open canal forms of them.

Q. And how many of those were made?

A. Why, something about two hundred.

Q. Do you know of any shapes being laid in the canal by Mr. Weisberger?

A. Yes, sir.

Q. When was that?

A. Well, it was sometime—I think it was about—

(Testimony of William Charles Bunce.)

well, it must have been about the 1st of November—between the 1st and the 20th.

Q. Do you know how many shapes were laid at that time?

A. Why, I would say between thirty and thirty-five—something like that, I'm not positive.

Q. Were you present when the shapes were being laid, or did you assist in the work?

A. Why, I didn't, no, in laying the shapes, but our apparatus we had there for laying them, the braces were a little bit weak and I was working around the machinery that laid the shapes, and there was one shape, I believe, laid before I left there and went up the canal.

Q. Do you know whether those shapes were left there in 1908 by the government or were they taken out?

A. Why, I don't think they was taken out. They broke one, but I don't know of any being taken out.

Q. Do you know anything about Mr. Weisberger's work in laying the shapes being stopped and the shapes taken out that fall?

A. Yes.

Q. What occurred about that?

A. I believe they had about eight laid and owing to a mistake in the grade given them they had to be taken out and set down to grade. I think it was eight shapes, I wouldn't be positive about it.

Q. Do you know whose mistake that was?

A. Well, it was understood that the level man

(Testimony of William Charles Bunce.)

or the engineer or some of those people gave them the wrong level.

Q. Were you familiar with the process that being used by Mr. Weisberger in placing the shapes in the canal and joining them?

A. No, I was not, nothing more than what machinery was put up for that purpose.

Q. I meant to refer to the machinery.

A. Yes.

Q. Do you know what kind of machinery was used by the government for the same purpose after the contract was taken over?

A. Why, practically the same, I guess, with a few additions. We used an eye beam, seven-foot eye beam, and I think there were some few little changes made, but practically the same.

Q. Then the apparatus that Mr. Weisberger used for laying the shapes and moving them was substantially the same as that used by the government in the completion of the contract?

A. Yes.

CROSS EXAMINATION.

Q. (Mr. Cain): You say you finally got a form and made the shapes all right?

A. Well, it made them so they were accepted by the government and put in the canal.

Q. Well, making the shapes was just merely a question of learning how to do it?

A. Well, in my way of thinking—the way I understand it—it was a question that the government al-

(Testimony of Herbert J. King.)

lowed them more leeway in their measurements—the inspector gave them more leeway.

Q. Well, you soon got a better form, did you not?

A. Well, of course—

Q. That made it more nearly a perfect shape?

A. Well, practice, of course, made us better—more efficient.

RE-DIRECT EXAMINATION.

Q. (Mr. Parker) But with your experience, all your experience in making those shapes there, were you able to get the radius and diameter within a sixteenth of an inch?

A. Well, you could get it, but you couldn't keep it there. If you would get it and set it, the next time you took it out it would vary—the spring and tension—the tension in the steel.

Q. Then it was practically impossible to keep it within a sixteenth of an inch?

A. And accomplish anything, yes.

(Witness excused.)

HERBERT J. KING, produced as a witness on behalf of defendants, having been first duly sworn, testified:

Q. (Mr. Parker) What is your name?

A. Herbert J. King.

Q. Are you acquainted with Mr. Weisberger, the defendant in this case?

A. Yes, sir.

Q. Have you at any time been employed by him?

A. Yes, sir.

(Testimony of Herbert J. King.)

Q. When?

A. From about the 10th of October, 1907, until the spring of 1908.

Q. In what capacity were you employed ?

A. As foreman.

Q. On what work?

A. On the laying of the shapes in the Tieton canal.

Q. How many shapes were laid by you as foreman for Mr. Weisberger in the Tieton canal?

A. Approximately thirty-five—within one or two.

Q. And when was that done?

A. Between the 10th and 20th of November, 1907.

Q. Did you encounter any difficulty in laying those shapes?

A. Well, in laying them to the satisfaction of the inspectors. We found it very nearly impossible.

Q. Was it necessary to remove any of the shapes after they had been set?

A. Yes, sir.

Q. For what reason?

A. Why, it had been placed to the wrong grade.

Q. Who ordered the suspension of the work or change of grade?

A. Why, I don't know whether Mr. Doolittle or his assistant, I forget which.

Q. Now, how did you get those shapes into the canal?

A. Well, they were first raised onto a car, a small car, and then by horse power dragged up into the canal and transported the length of the canal between

(Testimony of Herbert J. King.)

the station 16, where the lining commenced, and the upper end of the work.

Q. Where were the first shapes laid with reference to the other end of the canal?

A. Station 16. Sixteen hundred feet below the head works.

Sixteen hundred feet below the head of the canal?

A. Yes, sir.

Q. Now, in order to get the shapes to the head of the canal from the point where they were manufactured over what route would it have been necessary to have taken them?

A. Why, it would be necessary to take them up through the ditch.

Q. Was any track constructed or arrangement made to transport the shapes through the canal?

A. Yes, sir.

Q. About how high was the canal above the place where the shapes were manufactured?

A. At a point opposite the yard?

Q. Yes, sir.

A. Why, I should say in the neighborhood of forty to fifty feet, perhaps more.

Q. Can you describe the topography of the land around the intake of the canal at the diverting dam as to being level or steep?

A. Well, in this section around the intake of the canal to the beginning of the line of Station 16, sixteen hundred feet, the canal flows or was located along the foot of the bluff, and at the beginning of

(Testimony of Herbert J. King.)

the line of Station 16 and from there on down for perhaps three thousand feet there was very little—as I remember it, there was very little space between the canal and the river—in fact, it is very precipitious in places.

Q. What space, if any, is there between the river at the point where the water is diverted from the river at the diverting dam and the canal?

A. Well, there is practically none there at the dam, but between the water and this lined section of the canal below the dam I should say there is a strip of fifty or sixty feet wide at the ordinary stage of the water.

Q. Now, had a manufacturing plant been located a short distance below the diverting dam would it have been less or more difficult to get the shapes into the canal than from the manufacturing plant below?

A. It would be immensely less difficult.

Q. Now, in the spring of 1908 were you employed by the government in placing these shapes?

A. Yes, sir.

Q. When did that employment begin?

A. I believe it was in the month of May, 1909.

Q. Was that canal lined, any portion of the canal lined and put in at that time?

A. Yes, sir.

Q. How far down was the canal lined when you entered the employment of the government in 1909?

A. Why, I couldn't say just exactly, but the shapes

(Testimony of Herbert J. King.)

had been set below the Trail Creek tunnel, about in here somewhere (pointing on Exhibit "Q").

Q. And how long did you continue with the government after that?

A. Until the following October, I think it was the 16th.

Q. And what were your duties during that time?

A. I was foreman on the lining or the joining of the canal.

Q. The joining of the canal?

A. Yes, sir.

Q. Now, referring to Defendant's Exhibit "B" and "BB": I will ask you if they are substantially in form the shapes that were set in the canal by Weisberger in the fall of 1907?

A. Exhibit "B" is the form used by him.

Q. Now I will ask you to examine Exhibit "C" and Exhibit "CC" and ask you if they are substantially the same as placed in the canal by the government?

A. Yes.

Q. Was that more or less difficult to set the shapes as manufactured by Mr. Weisberger and set in the fall of 1907 then to set the shapes manufactured by the government and which you assisted to set in 1909?

A. It was infinitely more difficult.

Q. In what did the difference in difficulty consist? Explain first the difficulties of setting this shape (referring to Exhibit "B.")

A. Well, it was found that the length of the sec-

(Testimony of Herbert J. King.)

tion was irregular, and if they were butted up together as required by the specifications to the one-eighth inch limit, that they would throw themselves out of line; in other words, they could not be kept in line and to the joint as required at the same time.

Q. And how was that overcome, if at all, in the other joints used by the government?

A. Why, the joints were widened so that they could be kept in line irrespective of the distance between the shapes.

Q. Now, in setting these shapes and attempting to join them with a sixteenth of an inch in radius would or would not there be a ridge left inside of the shape?

A. Well, there was, yes.

Q. And what was the result of that, what did the government subsequently adopt to avoid that abrasion in the shapes?

A. Well, the offset, as you might call it, was still present, but the width of the joint allowed the offset to be tapered off, if I may express it that way; in other words, there was not the sharp projection that would be present in the other shapes.

Q. Now, from the experience that you had there, Mr. King, what would you say as to whether or not it was possible or impossible to line that canal with shapes constructed as this Exhibit "B", with a variation one-sixteenth and one-eighth of an inch?

A. I should say it would be practically impossible.

MR. PARKER: That is all.

(Testimony of A. P. Davis.)

CROSS EXAMINATION.

Q. (Mr. Williamson) When you say "practically impossible", do you mean impossible or more difficult?

A. I think "practically impossible" would cover it.

Q. You mean, then, it was not practicable?

A. I mean even more than that.

Q. Not impossible? What do you mean?

A. Why, I mean economically impossible.

(Witness excused.)

A. P. DAVIS, recalled as a witness on behalf of defendants, testified:

Q. (Mr. Richards: Mr. Davis, when you were on the stand for the plaintiff. I believe you testified that you audited the account and determined the cost of this excess work, or the excess cost of the work, done by the government, over and above the contract price which it was to pay Mr. Weisberger, did you not?

A. I testified I determined the cost, yes, sir.

Q. From what did you determine that cost?

A. From the reports of the engineers and accountants who computed them.

Q. Did you have any actual knowledge of it yourself?

A. Of the work?

Q. Yes.

A. I did of the work, yes, sir.

Q. Did you have of the cost of the work—the prices?

(Testimony of A. P. Davis.)

A. I did not investigate the original invoices. Is that what you refer to?

Q. Yes, and the payrolls. Did you investigate those personally?

A. Not in connection with this, no, sir. I occasionally look through payrolls in a general way and inform myself of the practice.

Q. So that in determining this cost you practically relied on the reports that were made to you by others?

A. I did.

Q. And that without any basis for your knowledge as to their completeness?

A. Yes, sir. To make that more complete I think I might say, that the people who had charge of it were people with whom I kept myself in touch, and I satisfied myself as to their accuracy and honesty by occasional visits.

(Paper writing produced by counsel for defendants marked as Defendants' Identification "T".)

Q. Mr. Davis, I show you Defendant's Identification "T" and ask you if you remember writing that letter.

A. I can't say positively that I remember it, but I presume I did.

THE COURT: Any objection to it?

MR. WILLIAMSON: It is irrelevant and immaterial and merely correspondence expressing an opinion.

THE COURT: It seems to me it proves but very little one way or the other.

MR. RICHARDS: It substantiates Mr. Weis-

(Testimony of A. P. Davis.)

berger's testimony that he did not consent to this suspension.

(After argument by counsel):

THE COURT: You may read it to the jury if you desire.

MR. RICHARDS: I will withdraw my offer of it for the present.

(A paper writing produced by counsel for defendant Weisberger marked as Defendants' Identification "U.")

Q. (Identification "U" handed witness) Do you recognize this as having received it?

A. I can't say that I do, but I had some correspondence with Mr. Henny on the subject and it looks genuine.

CROSS EXAMINATION.

Q. (Mr. Williamson) Has the defendant The Empire State Surety Company ever questioned, prior to this trial, the accuracy of those accounts?

MR. RICHARDS: I object to that as immaterial.

THE COURT: I sustain the objection.

MR. MEIGS: I would like to ask him one question.

THE COURT: Ask him.

Q. (Mr. Meigs) Have you or the secretary of the Interior, or any representative of your office, or of the office of the secretary of the Interior, to your knowledge, ever made any offer or tender of performance to The Empire State Surety Company on the contract of Mr. Weisberger suspended by action of the secretary of the Interior, February 28, 1908?

(Testimony of A. P. Davis.)

A. Tender of performance?

Q. Yes.

A. I don't understand that question.

THE COURT: You mean turned the contract over to them?

MR. MEIGS: Yes, for performance.

A. In performing this contract?

Q. Yes.

A. In place of Weisberger?

Q. Yes.

A. I can't remember about that. I do not remember that any was, but there may have been.

Q. As a matter of fact—

A. I was in the field at the time of the suspension, and it might have been done without my knowledge.

MR. CAIN: I think that is irrelevant, Your Honor, for the reason that the contract fixes what shall be done in case of suspension. There is no provision in the contract for turning the contract over to the Empire State Surety Company in any event.

THE COURT: I did not suppose the government entered into such a contract. It may have.

MR. CAIN: No, Your Honor, it did not.

And thereupon the Court declared a recess for ten minutes, and upon resuming the following proceedings were had, to-wit:

MR. RICHARDS: If the Court please, I offer this letter that I had identified as Defendant's Identification "T".

(Testimony of A. P. Davis.)

(Letter of January 31, 1908, received in evidence and marked Defendant's Exhibit "T".

I now offer letter of January 30th, 1908.

(Letter referred to received in evidence and marked Defendant's Exhibit "M".

I introduce this letter as Defendant's Exhibit "U".

This is extension of Weisberger contract, July 18, 1907.

MR. CAIN: I don't see any relevancy—

MR. WILLIAMSON: We object to it as incompetent, irrelevant and immaterial.

MR. CAIN: There is nothing in that to disprove any issue in the case.

THE COURT: I will sustain the objection.

MR. MEIGS: Our reason, if Your Honor please, in offering these letter is to show the state of mind of the representatives of the Secretary of the Interior and the engineer in chief on the ground here.

THE COURT: You can read the letter to the jury, if you desire.

MR. MEIGS: Letter of October 3, 1907, written by Joseph Jacobs, District Engineer read to the jury.

Letter of September 27, 1907, addressed to District Engineer, North Yakima, Washington, signed by Acting Supervising Engineer read to the jury.

MR. MEIGS: I want to offer this letter in evidence (exhibiting same to Mr. Cain).

MR. CAIN: I object to this.

THE COURT: Read the letter to the jury.

(Letter of July 17, 1907, addressed to District Engi-

(Testimony of Theodore Weisberger.)
neer, North Yakima, Wash., signed by Acting Supervising Engineer, read to the jury. Also certificate to accompany request of Theodore Weisberger for extension of time on contract No. 147.

MR. RICHARDS: I wish to recall Mr. Weisberger.

THEODORE WEISBERGER, re-called as a witness on his own behalf, further testified as follows:

Q. (Mr. Richards) Mr. Weisberger, what difference did this insistence on the manufacture of these shapes to one-sixteenth inch radius make in the rapidity with which you could manufacture them?

A. Did you say one-sixteenth or one-sixth?

Q. One-sixteenth, is what they required originally, as I understand it.

A. I believe that to make those shapes one-sixteenth of an inch is as nearly impracticable as to require them to be mathematically perfect. In a piece of concrete of that size made under those conditions—

THE COURT: The question was the difference in cost.

MR. RICHARDS: Not the difference in price but the rapidity of manufacture.

Q. Could you manufacture them more rapidly after they gave you a larger radius?

A. Oh, yes. Immediately an additional allowance for errors and radius was made our manufacturing progress jumped twenty-five shapes per day. That is, on September 9th I demanded of the engineer in charge in the canyon that some allowance be made on that, that I had found it utterly impossible to make those shapes

(Testimony of Theodore Weisberger.)

within a sixteenth of an inch, and I felt that everyone, after one month and nine days work, should be willing to concede it.

Q. Now, did you ever estimate the amount of time you lost by reason of that requirement of one-sixteenth?

A. The first month.

THE COURT: That is, by the requirement of the contract?

MR. RICHARDS: Requirement of the government inspector, and that is also a requirement of the contract.

A. I wish to say in the contract there is no provision for any allowance for error in this shape. In the absence of that we presumed there would be a reasonable allowance for error, because it would be utterly impossible to make them mechanically perfect.

Q. Well, did you lose time on account of this, and how much?

A. Well, the first month we simply fiddled away time trying to do that.

Q. Everything lost the first month?

A. During the first month we made something like three hundred and fourteen shapes, and on the tenth of the month, the day following the 9th, we began to make shapes in good earnest, because the engineer had increased that allowance to one-eighth of an inch.

Q. Now, in regard to that requirement of the contract, leaving the supports under the cross bars for sixty days, did that cause you any extra expense or time?

(Testimony of Theodore Weisberger.)

A. Yes, it did in this way. The contract specifically states in a certain paragraph, I think it is 112A, I am not sure on that, that the forms may be removed forty-eight hours after casting the shape. The engineer here required that the bottom cross bar form be left in sixty days, and I wrote a letter stating that I was willing to put in those cross bars, but at the end of the season I would render a bill for the extra cost, for the extra forms required in leaving these in for sixty days, we would lose them as fast as we put them in, and it required a great number of them to keep up with the work, whereas, if we could remove them in forty-eight hours then only a small number was required. The extra amount caused by this order was, as I remember it, some sixteen hundred dollars, and at the end of the season I rendered a bill to the government for \$705.00 on account of this extra cost on account of the requirement of the engineer.

Q. Was that ever paid?

A. It was promptly disallowed, and a different paragraph not covering this proposal at all was quoted to me as justifying the rejection of that bill.

Q. Was there any money due you on this contract at the time you ceased work in the fall of 1907?

A. The last estimate was due and this cross bar bill was due.

Q. What did that amount to?

A. Oh, roughly I should say thirty-two hundred dollars.

Q. Was that ever paid?

(Testimony of Theodore Weisberger.)

A. It was never paid.

Q. When did the government take possession of your warehouse up there?

A. Our warehouseman informed me, on my return from Washington, that they demanded the keys on the 3rd of February.

Q. And it has had possession ever since?

A. They had possession ever since and are still in there.

THE COURT: He testified to that the other day and also to the rental value.

MR. RICHARDS: He testified to the rental value but I forgot to ask him how long they were in possession.

Q. Where were you when they took possession of this stuff?

A. I was in Washington.

Q. And they had possession when you returned?

A. When I returned they had possession.

Q. What was the difference between the machinery used by the government in placing these shapes in the canal the following year and that used by you?

A. Only in the supports for the rigging by which the shapes were suspended. We used an eye beam on which we had a traveling trolley, and attached to that was what is known as Yale & Towne Triplex Chain Block, and we could handle it very nicely with that. We could raise it or lower it with ease.

Q. The manner of lowering and lifting was exactly the same?

(Testimony of Theodore Weisberger.)

A. Was exactly the same.

Q. Is that drawing over there a correct representation of one of these shapes, the full size (showing)?

A. It is a life sized reproduction of the original drawing.

Q. Drawn to scale and is correct?

A. Drawn to scale.

MR. RICHARDS: I want to introduce that in evidence as Defendant's Exhibit "Y".

THE COURT: It is a very cumbersome document to go from one court to the other. It will be received.

Drawing referred to received in evidence and marked Defendant's Exhibit "Y".

Q. (Mr. Richards) Now, Mr. Weisberger, if the government had not suspended this contract or interfered with you could you have completed the work which you had agreed to do within the time granted after the extension by the government?

A. Yes, sir.

MR. RICHARDS: That is all.

Q. (Mr. Williamson) How much did you say that extra was you did?

A. \$705.00 was the bill offered.

Q. I hand you herewith statement No. 3 of Plaintiff's Exhibit "1" and ask you to read the item on the outside.

A. Supporting statement No. 3, extra work done by contractor to suspension of contract, \$845.77.

(Testimony of Theodore Weisberger.)

Q. Will you note how much of that bill is for cross bar moulds prior to suspension?

MR. RICHARDS: I object to this, Your Honor.

THE COURT: It is utterly immaterial except as an offset, and if he has been credited with that it would be set up as an offset.

MR. RICHARDS: It is not.

A. You refer particularly here, Mr. Williamson, do you, to this last item, November labor making 1593 cross bar moulds at thirty-eight and a half cents, \$613.30? That does not seem to be the amount.

Q. (Mr. Williamson) Labor testing cross bars, 334, \$2.06; making the cross bar moulds, \$613.30, plus fifteen per cent on that, approximately your amount stated, isn't it?

A. It seems to be short about a hundred dollars.

Q. \$613.30 plus \$5.00 is \$618.00, plus fifteen per cent of that is very nearly, exactly, isn't it?

A. About short a hundred dollars, about ninety-three dollars short.

MR. WILLIAMSON: That is all.

MR. RICHARDS: That is all.

(Witness excused)

MR. RICHARDS: I want, if the Court please, to dictate this stipulation as to the changes at this time.

MR. CAIN: That don't make any difference as long as you specify what the changes are.

MR. RICHARDS: Don't you think it would be better to read this right into the record.

MR. CAIN: If the Court please, we admit the

truth of the facts stated in this stipulation, subject to the objection of irrelevant and immaterial for the reason that they are changes contemplated by the clause of the contract providing for changes in specifications, then it becomes a question of law.

THE COURT: That may be if there is nothing beyond the mere changes. It might become material at some stage of the trial. I will admit the stipulation. Read it to the jury. (same being read to the jury and filed with the clerk).

MR. RICHARDS: If the Court please, lest there may be some mis-conception before the trial is over, and to avoid the possibility of my having put my client at a disadvantage, I want to withdraw the objection that I made to the question that was asked on cross examination yesterday, the last question that they asked him on cross examination. You remember how that matter came up? The question I objected to was the question whether or not Mr. Weisberger at a certain time made a certain statement in regard to his financial ability. I objected to that and reserved the right to the further consideration of it.

THE COURT: Very well if you desire to withdraw that.

MR. RICHARDS: I withdraw the objection.

THE COURT: You desire to have the question answered?

MR. WILLIAMSON: We will desire to cross examine at greater length. We rested on cross examination on—

(Testimony of Theodore Weisberger.)

THE COURT: The witness will take the stand, then.

THEODORE WEISBERGER, recalled on behalf of the plaintiff for further cross examination, testified as follows:

Q. (Mr. Williamson) Did you state to the engineers, Mr. Weisberger, on or about January 1st, 1908, that unless the change in design of canal, which was applied for by you, be granted you would be unable to finance the further operations of your work?

MR. RICHARDS: I think, if the Court please, he should state to whom that statement was made.

MR. WILLIAMSON: The engineers, meaning the local engineers in North Yakima?

MR. RICHARDS: Well, now, who?

A. We had a good many conversations.

Q. Wait a minute.

THE COURT: I think you should state to whom the statements were made. There were different engineers in charge at different times.

Q. (Mr. Williamson) Mr. E. V. Robson, Supervising Engineer, or to Mr. Charles H. Sweigart, Construction Engineer of the Tieton project?

A. I did not.

Q. Did you, during the month of January, visit Washington, D. C., and at that place have a conference with the Director, or Acting Director, of the Reclamation Service regarding your application for change in design?

(Testimony of Theodore Weisberger.)

A. Who do you mean by the Acting Director, Mr. Williamson?

Q. Mr. F. H. Couch, Mr. Morris Bean or Mr. A. P. Davis?

A. I made a trip to Washington, D. C., to offer to Mr. A. P. Davis, Chief Engineer of the Reclamation Service, an application for a change in the specifications, but under the terms of the contract there was a provision that would allow me to do that in case I found, during the construction, that it was impossible to comply strictly with the specifications.

Q. You recall the paragraph in the specifications?

A. I could point it out if you would give me the specifications.

Q. You refer to paragraph 27 of the general specifications (exhibiting same to witness)?

A. I do.

Q. That paragraph reads: "Should the contractor, by reason of conditions developing during the progress of the work, find it impractical to comply strictly with the specifications," and so forth, that is the paragraph?

A. That is the paragraph.

Q. You went to Washington at that time for the purpose of urging your suit for change in design under that paragraph, did you not?

A. For not the change in design, for a change in accomplishing the same design in a different way.

MR. WILLIAMSON: I don't think that is responsive to the question, Your Honor. I move to strike the answer of the witness.

(Testimony of Theodore Weisberger.)

THE COURT: Read the question. (Question repeated). Answer that question yes or no.

A. Yes. The change being merely in respect to the method of accomplishing the same thing, the same character of canal.

Q. (Mr. Williamson) The change being material in the plan of construction of that canal, however, was it not, Mr. Weisberger?

A. No, merely in the method of construction.

Q. Didn't you state yesterday that there were no joints in the canal, that you suggested—

A. I did.

Q. (Continuing)—it was a monolithic line?

A. It was a monolithic line.

Q. Instead of the shapes?

A. Instead of the shapes.

Q. At that time did you personally discuss your situation with Mr. James Rudolph Garfield, Secretary of the Interior?

A. I did not.

Q. Did you see him at all during that visit?

A. I did not.

Q. Did you make any effort to?

A. I did.

Q. And failed to see him?

A. I was advised there was no use to see him.

Q. Who advised you?

A. Morris Bean.

Q. Did you state to Mr. Bean, on or about the latter

(Testimony of Theodore Weisberger.)

part of January, 1908, that you could not make financial arrangements to carry on your work?

A. I did not.

Q. Did you, Mr. Weisberger, during January, 1908, visit New York for the purpose of taking up with the Surety Company the matter of your operations under this contract?

A. I went to New York from Washington—

Q. Answer my question, please.

A. Yes.

MR. RICHARDS: Now make whatever explanation you want.

THE COURT: You can bring it out on cross examination. The question has been answered fully.

Q. (Mr. Williamson) Did you at that time take up with the Surety Company the matter of their execution of a contract, a further contract, with the United States regarding the maintenance of roads in the Tieton canyon?

A. My recollection is there was some discussion on that—you refer to that supplemental contract on the road proposition?

Q. Yes.

A. I think I did, yes.

Q. Did they consent to it?

A. My recollection is that they did not consent to it.

Q. Do you recall if they stated any reason why they would not consent to it?

(Testimony of Theodore Weisberger.)

MR. RICHARDS: If the Court please, I don't see that is material to this contract.

THE COURT: I will sustain the objection.

Objection. Sustained. Exception.

Q. (Mr. Williamson) Did they at that time, Mr. Weisberger, state to you that they would enter into no further contracts or agreements regarding the contract of any contractor upon whose contract they were bondsmen who were in default?

MR. RICHARDS: Objected to as incompetent, irrelevant and immaterial in this case, the statement of that company not being binding.

THE COURT: I will sustain the objection.

MR. WILLIAMSON: I think, Your Honor, that going to the contractor's ability to carry on this contract we have the right to go into any correspondence or any matters which show at that time that he was in default.

THE COURT: Is this supplemental contract necessary to carry out the work? Do you claim it was?

MR. WILLIAMSON: No.

THE COURT: Do you claim their views or statements had anything to do with this insolvency?

MR. WILLIAMSON: Yes, I think it does.

THE COURT: I think it has nothing to do—

Q. Mr. Weisberger, did you at that time try to make financial arrangements with the surety company to carry on your contract?

MR. RICHARDS: That is objected to.

Objection. Overruled. Exception.

(Testimony of Theodore Weisberger.)

A. Yes. There is quite a long story ahead of that, though.

MR. WILLIAMSON: Well, just a moment or two and see if it is necessary to tell that story.

Q. Did they consent or refuse to finance it further?

MR. RICHARDS: That is objected to, if the Court please, as irrelevant and immaterial. What one party did or did not do would not be material as to this man's financial standing.

THE COURT: A man carrying out this contract depends upon his means himself and not any conversations with third parties.

MR. WILLIAMSON: Credit is one of his means of carrying it out, and I want to know whether they refused him credit.

THE COURT: Credit is very often refused with solvent men and very often extended with insolvent ones. I will sustain the objection.

Objection. Sustained. Exception.

Q. (Mr. Williamson) Were you financially able, Mr. Weisberger, to continue work under your contract and complete it within the time fixed thereby had the contract not been suspended?

A. I was.

Q. What were your assets at that time?

A. At this time they consisted of some seventy thousand dollars worth of equipment. If this Tieton contract—

Q. Were there any obligations against that?

(Testimony of Theodore Weisberger.)

MR. RICHARDS: Let him state what his assets were.

A. They consisted further of a warehouse and property at Naches City,—

Q. (Mr. Cain) State the value.

A. About seven thousand to eight thousand dollars. This was the warehouse that was built to store cement for this particular work. It consisted further of some first mortgage securities amounting to about fourteen thousand dollars, and property in North Yakima valued at about seven thousand, and further an excellent credit at my bank.

Q. (Mr. Williamson) Were those assets that you mentioned free and clear above all obligations?

A. Not entirely.

Q. Will you state your obligations at that time, if you remember them?

A. I forgot one asset I would like to put in at this time before I answer that.

Q. You may.

A. Two other properties worth about thirty-one thousand dollars. Now, answering your question regarding the liabilities, there was a first mortgage of three thousand dollars; there was—there were some—was an assignment of these two properties worth thirty-one thousand dollars.

Q. An assignment how?

A. An assignment to the Yakima Valley Bank.

Q. Then you didn't have them at that time, they were not an asset, they were securities for an asset

(Testimony of Theodore Weisberger.)

which you state was your credit at the Yakima Valley Bank, is that correct?

A. They were the surplus—yes, sir, they were a liability.

Q. Well, are you counting both the security and liability as asset? What was your net asset at the Yakima Valley Bank on January 1st, 1908?

A. I had never exceeded it so I don't know. I could state what it was following the suspension of this contract, I think.

MR. RICHARDS: That is not material.

Q. (Mr. Williamson) What other obligations were there against this property?

A. I think that a part of it as assigned as security to the bonding company securing them against loss on this contract.

Q. That, then, was not an asset you could realize upon, was it?

A. I understood it was in case I should need to draw upon it.

Q. Did you ask them while you were in New York if you could draw upon it?

A. I think not.

Q. You didn't ask them if you could draw upon that security they had to continue your work?

A. I think the question came before them in a different way. I don't think the matter of this security came up at all.

Q. As a matter of fact, had they allowed you to draw upon it prior to that time?

(Testimony of Theodore Weisberger.)

A. The question had never come up.

Q. You had never asked them for it?

A. Never had.

Q. You never asked the bonding company for any assistance in accordance with their understanding?

A. Not in regard to this security.

Q. Did you ever ask them for any assistance in connection with the operation of the work?

MR. RICHARDS: I think that is immaterial, if the Court please.

THE COURT: I think it has an indirect bearing upon carrying out the contract. Read the question.

Q. (Question repeated).

A. Yes, upon the demand of A. P. Davis.

Q. (Mr. Williamson) Upon the demand of A. P. Davis?

A. Yes.

Q. Why should Mr. Davis demand you to ask the surety company to assist you?

A. For this certain change that I came to Washington to put before the department this question of relief from the old method of setting shapes in the canal to a more practical method of building the canal, and when I arrived there and after I had placed this application before him and gone into a pretty thorough discussion of the proposition, I was confronted with a demand to make a financial showing that would satisfy the engineer of my financial ability to carry on this work.

Q. Did you make such showing?

(Testimony of Theodore Weisberger.)

A. I did not.

MR. RICHARDS: I object to that question as immaterial. I still maintain my position taken before in the case that was no part of the—

THE COURT: The question has been answered in any event. Proceed with the examination.

Q. (Mr. Williamson) Did you make an effort to make that showing?

MR. RICHARDS: Same objection as immaterial.

THE COURT: Unless the showing was made I think it is immaterial.

Q. (Mr. Williamson) Mr. Weisberger, at that time, then, they refused you that assistance?

MR. RICHARDS: That is objected to, if the Court please.

THE COURT: Objection sustained.

Objection. Sustained. Exception.

Q. (Mr. Williamson) Mr. Weisberger, was the sixty-one thousand dollars worth of equipment which you said you had as an asset, the property which you had in the canyon preparatory to doing this work, and including the warehouse and plant at Naches—

A. There was a part of it not in the canyon. Most of it was in the canyon.

Q. Part of it at Naches?

A. Yes, sir.

Q. Was that the price you paid for it or the price you estimated its value on January 1st, 1908?

A. That was the estimated value of this stuff where it was at the time.

(Testimony of Theodore Weisberger.)

Q. Were there any obligations against that asset?
Was that machinery entirely paid for?

A. It was all settled for.

Q. All paid for?

A. All settled for.

Q. Was it paid for?

A. Yes.

MR. RICHARDS: That is an answer.

Q. (Mr. Williamson) Then that was free and clear, no obligations against that?

A. None whatever. I desire to modify that by stating that there might have been some three or four hundred dollars of accounts.

Q. Mr. Weisberger, on January 1st, 1908, you owed the First National Bank of North Yakima eight thousand dollars, did you not, unsecured?

MR. RICHARDS: I don't know whether that is relevant or not. You asked him what the encumbrances on the property were.

MR. WILLIAMSON: I asked him on his liabilities, I believe. If I didn't I will let him go ahead and possibly he will state that.

MR. RICHARDS: The question now is as to unsecured liabilities, if the Court please. I don't know whether that is relevant to this inquiry or not. That is objected to as irrelevant.

THE COURT: Objection overruled.

Objection. Overruled. Exception.

A. I think that amount is overstated. I think I owed the bank some six thousand dollars.

(Testimony of Theodore Weisberger.)

Q. (Mr. Williamson) On that date, Mr. Weisberger, did you not owe the Yakima Valley Bank some eighteen thousand dollars?

MR. RICHARDS: Same objection.

THE COURT: Same ruling.

A. On what date was that?

Q. (Mr. Williamson) January 1st, 1908.

A. I couldn't tell you that. Those amounts varied. I couldn't tell you what amount.

Q. Well, at about that time your indebtedness was in the neighborhood of eighteen thousand dollars, more or less?

A. January 1st? That is approximately the amount, I think, Mr. Williamson.

Q. Mr. Weisberger, had you, up to January 1st, 1911, paid for your labor claims which had accrued against you at that time?

A. I think so.

Q. You didn't owe any labor or material men?

A. Well, there might have been two or three men who had scattered out over the country, something of that sort.

Q. Had you paid Mr. Crownholm?

A. He was one of those, I think, who went away.

Q. Had you paid Mr. Dimmick for hauling?

A. On what date?

Q. January 1st, 1908?

A. I had an arrangement with Mr. Dimmick whereby he was to be paid from the estimate which was due me on work by the United States. This estimate was

(Testimony of Theodore Weisberger.)

held up and refused, and I later settled with Mr. Dimmick on another basis.

Q. Did you pay him the money that you owed him?

MR. RICHARDS: If the Court please, I don't know whether it is material or not if he paid him the money, if he settled with him. He might have been willing to take something else.

THE COURT: If he has discharged the obligation the government is not concerned how it was discharged.

A. I did discharge the obligation.

Q. (Mr. Williamson) As a matter of fact, Mr. Weisberger, didn't Mr. Dimmick refuse to haul any material for you during December until you paid him?

A. He did not on that account.

Q. Didn't he make an effort to collect the money from you?

MR. RICHARDS: If the Court please, I don't see that is material. The witness has stated he settled the account.

THE COURT: If he settled it I think beyond that it is immaterial.

Q. (Mr. Williamson) You executed a mortgage in June or July on your equipment for some twenty-five thousand dollars?

MR. RICHARDS: What year?

MR. WILLIAMSON: June or July, 1908.

MR. RICHARDS: That is objected to.

Q. (Mr. Williamson) I ask if that was to secure

(Testimony of Theodore Weisberger.)

obligations incurred in connection with this contract? which were due and pending on January 1st, 1908?

MR. RICHARDS: That is objected to as immaterial.

THE COURT: Objection overruled as long as it refers back to the time of the transaction.

Objection. Overruled. Exception.

A. Will you read the question?

Q. (Question repeated).

A. I did execute such a mortgage, and it was made for this reason: I had closed practically all the open accounts with persons who had had open accounts on account of equipment furnished, and it was done for this reason: I was preparing myself for the next season's work and shaping up everything for the past season, and I closed all these accounts, practically all these accounts, by the payment of from ten to twenty per cent in cash and the remainder by giving unsecured notes. After the suspension of this contract, and feeling it only a matter of good faith to these persons holding unsecured notes, I executed this mortgage voluntarily and made all these parties to share in its benefits so that if the government carried out this contract and I can secure this equipment that I could liquidate those claims.

Q. (Mr. Williamson) Mr. Weisberger, is it not a fact that the Yakima Valley Bank, with whom you did all your business, refused to honor your checks for the last month's work you did in 1907?

(Testimony of Theodore Weisberger.)

A. I think they did honor them; in fact, they furnished the money.

Q. Didn't they dishonor your checks?

A. They furnished the money to pay those checks.

Q. Did they dishonor any checks that were presented over the counter?

MR. RICHARDS: If the Court please, I don't think that is material.

THE COURT: He testified a while ago he had credit at the bank.

A. I recall one instance when I was away that we inadvertently overdrew and one of the employes of the bank turned down a check, and immediately upon my return—

Q. (Mr. Williamson) Is that the only instance you recall?

A. That is the only instance that I recall. The bank was making a strict ruling, strictly no overdrafts.

Q. As a matter of fact, didn't the Yakima Valley Bank suspend any action upon your application for further credit? in January and December, 1907, until you had gotten a decision upon whether or not you were going to get a change in design, change in canal?

A. I don't understand what application you mean. There wasn't any made.

Q. You didn't ask for further financial assistance from the Yakima Valley Bank?

A. When was that?

Q. The fall, November or December, 1907.

A. What month?

(Testimony of Theodore Weisberger.)

Q. November or December.

A. November or December I made loans there, I made loans at the bank. I don't know of any application there that was not granted. In fact, the bank never turned down an application for a loan; they never refused me any credit that I needed.

Q. Did they ever indicate to you that they would?

A. They did not.

Q. You had an unlimited credit with the Yakima Valley Bank?

A. Not unlimited. I wouldn't attempt to say that.

Q. I don't mean unlimited, but so far as your interests were concerned in carrying on the further operations of this contract you had credit?

A. For the next season?

Q. Yes.

A. I had the same credit that I had for the past season, the understanding being the bank was going to carry me through on the contract with that arrangement.

Q. They never withdrew that action?

A. Never did.

Q. You state, then, as a matter of fact, Mr. Weisberger, that you were financially and otherwise able to have completed this contract within the time specified?

A. I was.

Q. You are unqualified in that statement

A. I was. In fact, after this suspension I went right on with other contracts, and a suspension is

(Testimony of Theodore Weisberger.)

the equivalent of declaring a receivership on a man. It is the worst thing can happen to him, and even in the face of that the bank backed me in other heavy contracts; went right on. It showed their good faith. The government was acting in a manner—

Q. Just a moment. There is no question before the witness, Your Honor. I didn't object to the other statement.

MR. CAIN: I want to ask the witness one question. I want to summarize these assets so we will understand each other, Mr. Weisberger.

MR. RICHARDS: If the Court please, I don't know that makes any difference, if he had the credit and go on with the contract. Of course, that is quite a general statement of his assets, and I think it is immaterial to go into the details of them.

MR. CAIN: It has been largely an expression of opinion, I think, on the part of this witness.

THE COURT: You are entitled to know, in view of the cross examination, what the assets were.

Q. (Mr. Cain) Your equipment, now, you say, was of what value?

A. About seventy thousand dollars.

Q. You said you owned property in Yakima, I believe, worth about seven thousand dollars?

A. Yes, sir.

Q. Now, what else was it that you enumerated?

A. Two other properties worth thirty-one thousand dollars.

Q. What were they?

(Testimony of Theodore Weisberger.)

A. They were farm lands.

Q. Where?

A. In this county?

Q. How many acres?

A. They were thirty-one acres.

Q. Thirty-one acres in the two farms?

A. Yes.

Q. What were the state of improvements on them?

A. Oh, they were well improved. They were both fenced, I suppose one of the finest fences in the valley; a very fancy barn on one, and a house and a foundation where I was intending to build a house when I got through with this contract.

Q. Was it orchard land?

A. It was all set out in orchard.

Q. What age trees?

A. Apples, peaches and pears. The property was later sold for twelve hundred dollars an acre. It brought more than what I stated there.

Q. How much later?

A. About two months, I should say, I have given you the conservative valuation. They actually sold for more money than that.

Q. They were worth about thirty-one thousand dollars, you say?

A. Yes.

Q. What else did you have?

A. The first mortgage securities for about fourteen thousand dollars, a warehouse and—

(Testimony of Theodore Weisberger.)

Q. You held mortgages for fourteen thousand dollars?

A. This is a credit now, Mr. Cain.

Q. I say, you held mortgages that were due to you?

A. These mortgages that had been assigned to the surety company I speak of.

Q. But they were mortgages you held on other property?

A. Yes, sir.

Q. All right, fourteen thousand dollars. Now, what else?

A. Warehouse property at Naches City, this side track, worth between seven and eight thousand dollars.

Q. Seven thousand five hundred you think?

A. Oh, that would be conservative, I think.

Q. What else?

A. I believe I had a property up at Selah at that time. It is quite a while ago. I think I had forty acres up at Selah there I sold after that. I won't make a positive statement as to that, we will just keep that out of the record.

Q. This is a statement of your assets as far as you recall it?

A. If I haven't neglected to put anything in there. I might think of something else.

Q. Your equipment, by that you mean tools, and machinery, and supplies for carrying on this work?

A. Yes.

(Testimony of Theodore Weisberger.)

Q. That includes everything, horses and harness and everything?

A. Everything. There were no horses, though.

Q. This machinery, which was a portion of this equipment, was of the character that it would have been very difficult to realize money upon, would it not?

MR. RICHARDS: I think that is immaterial. It is an asset for the purpose of this matter that any man would have had to have and it was worth whatever it was worth up there in that place regardless of whether he could sell it when he got through or not.

THE COURT: If he needed to have money to carry on the contract we might consider whether he could raise money on it or not.

MR. RICHARDS: For the purpose of this contract it was worth what it was worth, and what he might sell it for afterwards would not be—

MR. CAIN: If it is a question of raising money upon it it is very necessary.

MR. RICHARDS: I don't think that is a proper element in this kind of an inquiry.

THE COURT: No, I think not.

Q. (Mr. Cain) Your property in Yakima, was that clear?

A. I think there was a three thousand dollar mortgage on that.

Q. That left, then, four thousand dollars of that your equity in it was worth?

A. Yes. I guess I put that a little too conservative.

(Testimony of Theodore Weisberger.)

I had an offer of eight thousand dollars that spring
We will raise that a thousand dollars.

Q. Five thousand dollars you think your equity was worth?

A. Yes, sir.

Q. This thirty-one acres you put at thirty-one thousand dollars, was there any mortgage on those?

A. No, they were clear. They were assigned to the bank, no mortgage, signed to the bank in trust.

Q. That had been assigned to the bank?

A. Yes.

Q. And the fourteen thousand dollars in mortgages had been assigned to the surety company?

A. Yes.

Q. And the warehouse at seven thousand five hundred dollars had been—any obligation against that?

A. That was assigned to the security company. There was a deal made this way: I owned forty-five acres of land, very valuable property, on Nob Hill, and originally I had assigned that to the security company. That probably, I guess was worth—I think I sold that property for thirty-two thousand dollars.

Q. What property was that you are referring to now?

A. Property out west of town.

Q. Did you own that at this time you are speaking about?

A. I am going to go into a deal now that will show you the good faith of the surety company in regard to the statement made.

(Testimony of Theodore Weisberger.)

Q. I am not caring anything about the good faith of the company, I just want to know your ability, your financial ability, to carry this contract on. The surety company had a fourteen thousand dollar mortgage and the seven thousand five hundred dollar warehouse?

A. Yes.

Q. The bank had the thirty-one acres which you considered and assigned amounting to thirty-one thousand dollars?

A. Yes.

Q. Now, how much money did you owe the banks at that time?

THE COURT: He has gone into that question.

MR. CAIN: I was just going to offset it against that.

THE COURT: Six thousand to one and eighteen thousand approximately to the other he estimated.

Q. (Mr. Cain): Then your equipment was your only unencumbered asset, wasn't it?

A. With the exception of the special arrangement I had on this bonding company stuff.

Q. Now, at this time, in addition to what you owed the bank, did you owe any other money? What was the aggregate of your indebtedness in open accounts in various places?

A. About two or three hundred dollars, I should judge.

Q. That would cover your labor account and all?

A. Yes. That does not cover the Dimmick ac-

(Testimony of Theodore Weisberger.)

count. That was to be taken care of out of this payment from the government.

Q. At this time how much was the Dimmick account?

A. I believe it was a little less than three thousand dollars.

Q. Say about twenty-five hundred?

A. I think it was more than that. I believe it was between twenty-eight hundred and three thousand.

Q. Well, say twenty-nine hundred dollars. And how much did you owe Mr. Crownholm?

A. Oh, I don't remember; a small amount.

Q. (Mr. Meigs) That was included in the open accounts?

A. Yes.

Q. Those open accounts, you intended to cover that, then?

A. Yes, sir.

Q. Did you have any definite specific arrangement with the bank, or any bank, at that time that they would loan you any particular amount of money?

MR. RICHARDS: That is objected to as immaterial. He said he had an arrangement with the bank whereby he said they would finance him through the contract.

THE COURT: He has a right to know what the arrangement of the bank was.

MR. RICHARDS: But as to specific sums of money, I don't think that is material.

A. Originally I had a very limited credit there, even at the time of the beginning of this contract. That

(Testimony of Theodore Weisberger.)

was later extended. When I started in there I was only going to have a credit of ten thousand dollars, and then when this panic of 1907—this affair was carried on during the panic of 1907—when they were certain of my securities that I couldn't turn or move the bank agreed to see me through on the whole contract. They got started in it and got interested in it and agreed to carry me all through.

Q. Had you told them how much money you would need?

MR. RICHARDS: That is objected to as immaterial.

A. I didn't tell them. I think Mr. Jacobs told them, though.

Q. (Mr. Cain) Did you write that letter (exhibiting same to witness)?

A. Yes.

MR. Cain: We offer that in evidence, Your Honor.

A. That is all right, Mr. Richards.

MR. RICHARDS: No objection to that.

Letter referred to received in evidence and marked Plaintiff's Exhibit "6".

Q. (Mr. Cain) Had any amount of money been agreed upon between you and the bank as the amount being necessary to complete that contract?

MR. RICHARDS: I don't think that is material, if the Court please. The bank couldn't necessarily tell what amount he would want.

THE COURT: He has a right to know what the agreement was, if there was one.

(Testimony of Theodore Weisberger.)

MR. RICHARDS: He stated the agreement was they would see him through the contract.

A. That was the agreement. I stated originally the agreement was ten thousand dollars, and then when they found out what the situation was there, it was going to take more money—there was a delay in completing the road there, there was a great burden upon me carrying all this stuff purchased early in the game. I began right off the bat. I spent eight thousand dollars before—

THE COURT: That is not an answer to the question. I think the question has been sufficiently answered.

Q. (Mr. Cain) Was there any agreement as to whether you were to furnish them security or not?

MR. RICHARDS: That is objected to, shown he had security up. Whether they wanted any more or not is immaterial.

THE COURT: I stated a while ago he has a right to know what the agreement was.

Q. (Mr. Cain) Was there anything in that agreement that involved the giving of additional security for this additional money you might need?

A. No. There was a subsequent agreement that if I could—during the summer, during that panic, that if I would convert one of those securities to the bank that they would agree to advance a limit of thirty thousand dollars the next year, making a definite proposition instead of an indefinite proposition.

(Testimony of Theodore Weisberger.)

Q. Which one of those securities was that?

A. That was, as I recall it, thirteen and a half acres right out on the Nob Hill car line, right above the Congdon ditch.

Q. Then this eighteen and six thousand dollars had already been drawn against that security as the portion of that agreement, had it not?

A. How is that?

Q. You did assign them one of those properties?

A. They were both assigned. I think they were assigned early in the agreement.

Q. Well, but at this time upon that thirty thousand dollars you had drawn twenty-four?

THE COURT: Eighteen on the one bank.

MR. CAIN: Eighteen, yes.

Q. Of that thirty thousand dollars credit arranged for you had already exhausted eighteen at this time, hadn't you?

A. No, no. You mistake me. At the time this statement was made there was this thirty-one thousand up and only eighteen against it. Does that answer your question?

Q. Yes. Then, I say, of the thirty thousand that you had arranged to get on that thirty-one thousand dollars you had already taken about eighteen thousand?

A. No, the arrangement was that if I would take up part of that eighteen thousand then that there should be an additional extended of thirty thousand.

(Testimony of Theodore Weisberger.)

Q. Then you had a credit of thirty thousand, that is what you estimate your credit at then?

A. Now, that was the arrangement prior to this suspension of the contract, some time previous to it, and, as I recall it, shortly after the suspension of the contract I realized on that security and practically wiped out the indebtedness to the bank entirely.

Q. Well, what I am trying to get at, then the arrangements you had with the bank contemplated a credit for the coming year of thirty thousand dollars?

A. Provided I turned that security and took up what the bank had loaned me.

MR. CAIN: That is all.

Q. (Mr. Richards): Otherwise it was an indefinite contract to carry out the contract?

A. Up to the time of the suspension of the contract it was indefinite.

Q. Now, Mr. Weisberger, did you have any moneys coming to you from the government at this time on the contract?

A. Yes.

THE COURT: That was testified to yesterday, three thousand dollars, or something of that kind.

MR. RICHARDS: Yes, I think so.

Q. What is the fact, Mr. Weisberger, on a contract of this kind, as to what stage of the contract the contractor makes money?

MR. CAIN: I don't know that is—

THE COURT: I presume it is when the returns are coming in.

MR. RICHARDS: You take the average large

(Testimony of Theodore Weisberger.)

contract of this kind and a man don't make a cent till he gets half way through and his profits don't begin to come. This contract provides here the payments are to be made along and he has got to make all his profits on the last end of the contract.

THE COURT: No doubt about that.

Q. That is a fact, Mr. Weisberger, you expect—

A. The fact is, in the beginning of a contract of this nature, where the mechanical difficulties are very great and requires a very heavy amount of equipment, there is always a loss in the beginning of such a contract, and sometimes that loss continues up till the middle of a contract, and I have seen contractors on contracts of that nature make up their loss during the last half of the contract and also make a profit, but that comes in the latter half when the whole thing is organized and under way. The first half is where the burden comes in.

Q. (Mr. Richards): Was there ever at any time, while you were carrying on this contract, any cessation of the work or delay on account of lack of funds on your part?

A. There was no cessation of work whatever, and at some times although it was difficult, I will admit that, through this panic time, I always secured funds sufficient to carry that work on as fast as it could be carried on.

Q. The object of this letter which they have introduced in evidence here as Plaintiff's Exhibit "6"

(Testimony of Theodore Weisberger.)

was to have the actual coin sent here instead of a check, wasn't it?

A. Yes, at this time.

Q. Just read that letter to the jury, Mr. Weisberger.

A. (Reading same to the jury).

Q. Did the government send the coin under that?

A. They did.

Q. That was right at the time the banks were issuing clearing house certificates instead of paying cash over the country generally?

A. They were issuing clearing house certificates all over the northwest. I don't think they did here.

MR. RICHARDS: That is all.

Q. (Mr. Cain): The work you had done up to the time of suspension amounted to approximately twenty thousand dollars?

MR. MEIGS: Your Honor please, the statement introduced by the government shows that nine per cent of the work had been performed, nine per cent of the contract price.

MR. CAIN: All right, we accept that.

Q. If you would have completed the contract within the time it would have required the purchase of considerable additional equipment, would it not?

A. Some additional equipment. I was perfecting arrangements to rent some equipment.

Q. In addition to the necessary incident expense of completing the contract you would have had to

(Testimony of Herbert J. King.)

make a pretty heavy outlay of money the next year for equipment?

MR. RICHARDS: I don't think that is material.

THE COURT: I don't think so.

MR. CAIN: All right, that is all.

(Witness excused.)

HERBERT J. KING, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Q. (Mr. Richards): Now, Mr. King, in addition to what you said yesterday, when you came to lay these shapes in this canal and fit them to an eighth of an inch joint, what was the result as to being able to follow the line or grade of the canal?

MR. CAIN: Objected to, if the Court please. That has been gone into.

THE COURT: You may answer the question.

A. Why, we found that it was impossible to follow the line of the canal, and also impossible to follow the grade.

Q. (Mr. Richards): You then found it impossible to lay those shapes in that way so as to make a proper lining for the canal?

A. In accordance with the inspection.

Q. And specifications?

A. And specifications.

Q. When you were laying for the government what width did they make these joints?

A. Personally I laid none. The joints were—

Q. You knew about them?

(Testimony of Herbert J. King.)

A. Yes, sir, I jointed them. The joints ranged from, on a tangent, from an inch and a quarter to an inch and three-quarters in width, and on curves, on the outer side of the curve, they ranged as high as six inches in places.

THE COURT: That was gone into by some witness.

MR. RICHARDS: Yes, but not this witness. I got that out of a government witness.

Q. What different kinds of material did they use in making those joints, Mr. King?

A. Well, they used, as I remember it, two grades of sand and two grades of aggregate.

Q. What was contemplated to be put into the original joint according to the specifications?

A. As I understood it, the original joint was to be caulked with jute and afterwards the inside portion filled with a stiff cement mortar.

Q. Did they do anything about wetting these joints in the canal when they were laid by the government and the wide joints made?

A. Yes, sir, they were wet.

Q. How?

A. Why, they were wet sacks, gunney sacks, were put over them and kept wet.

Q. How much surface of the canal was covered at a time in that way?

A. Well, it was required to keep the joints that had been made for ten days wet.

Q. And how much canal at a time would you have?

(Testimony of Guy Finley.)

A. Well, as the work progressed we might have three thousand feet.

Q. That is, times it would be as high as three thousand feet under canvas?

A. I think so.

MR. RICHARDS: I think that is all, Mr. King.

MR. CAIN: That is all.

(Witness excused).

MR. RICHARDS: I don't know, Your Honor, whether there is any sufficient or definite location in the record in regard to these points on this map. It seems to me that they have testified very generally without specifying.

THE COURT: When you come to make up your record you can refer to it properly. It has been sufficiently identified now.

MR. RICHARDS: Very well.

GUY FINLEY, produced as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. (Mr. Richards): What is your first name?

A. Guy.

Q. Where do you live?

A. Naches.

Q. What are you doing?

A. I am in the employ of the government as an engineer.

Q. How long have you been in the employ of the government?

(Testimony of Guy Finley.)

A. I came here in June, 1907, but I have been gone two winters and I have been in their employ all that time.

Q. Did you work for Mr. Weisberger at any time on the work up there?

A. No, sir.

Q. You have been in the government employ. Were you on the work there when the government was laying these shapes?

A. Yes, sir. Well, I say I wasn't in Mr. Weisberger's employ, I was in the employ of the government, but doing work under the contract one summer, three months.

Q. That was after Weisberger stopped, you mean?

A. That was in part of June, July and part of August, a part of September, in 1909.

Q. Now, what did you have to do with the laying of the shapes during that time?

A. I was foreman over the gang that laid the shapes, which was a crowd of about twelve to fourteen men.

Q. Is this form "CC" here, "C" and "CC," substantially the form of the sides of those shapes as laid by the government?

THE COURT: It seems to me the witnesses for the government and the witnesses for the defendant have agreed throughout as to the character of these forms and the manner in which they were laid. If there is any discrepancy in regard to the width on

(Testimony of Theodore Weisberger.)

each side of the case you can go into it, but I can't recall any.

MR. RICHARDS: I think I would agree with the Court it had been covered substantially. That is all, I think, Mr. Finley.

A. I didn't answer your question.

MR. RICHARDS: Well, the Court thought it wasn't necessary, that we had enough evidence on that subject.

MR. CAIN: No questions.

(Witness excused.)

THEODORE WEISBERGER, recalled as a witness on his own behalf, further testified as follows:

Q. (Mr. Richards): Mr. Weisberger, in your cross examination you testified to going to New York to see the surety company. State how you came to do that and what the circumstances were.

A. The circumstances were these, that when I appeared in New York—

Q. How did you come to go there first?

A. I came to Washington with the object of presenting an application in the manner of making this lining with Chief Engineer Davis. I had made application to the local engineers some two months previous and had heard—

Q. Don't go into very full details, just get to the point—

A. I hadn't been able to get any action from local engineers on this, and they had turned it down, and as the Chief Engineer was the one stated in this con-

(Testimony of Theodore Weisberger.)

tract who had the final decision in these matters I took the matter up with him, and after presenting the proposition he made the demand that I make a financial showing that I was able to go on with this contract, and I at that time did not recognize that the government had any right to such a financial showing and had not come prepared with one, had only come prepared to put this matter of change. They told me that my contract would be suspended unless I could make this showing at once, and I was told unless I could get the assistance of the bonding company to make a financial showing at this time that the contract would be suspended. They would not wait until I went to North Yakima to interview my banker, and I was forced to go to New York in order to prevent the suspension. I went and put the matter before the bonding company. I stated the facts in regard to our troubles in laying these shapes. I stated frankly our troubles in regard to manufacturing these shapes. I stated frankly all the troubles that had arisen from misunderstanding with the engineers—

THE COURT: I think you have answered the question.

MR. RICHARDS: I think you have answered the question, Mr. Weisberger.

Q. Did you ask Mr. Davis to give you time to return to North Yakima?

A. I did.

Q. (Mr. Meigs): In order to make this financial showing?

(Testimony of Theodore Weisberger.)

A. Yes.

Q. And was that privilege accorded you or refused?

A. It was not.

Q. It was not what?

A. It was not accorded. Mr. Henney originally suggested my going to New York and then Mr. Davis insisted upon it.

MR. MEIGS: That is all.

Q. (Mr. Cain): You were requested on the 2nd of January to make that showing, were you not?

A. Yes.

MR. RICHARDS: That is objected to as immaterial.

THE COURT: The witness has answered.

MR. CAIN: That is all.

(Witness excused.)

MR. RICHARDS: I desire to offer this. It is the progress sheet, the record of the progress of the work on the canal.

MR. WILLIAMSON: The Weisberger work or the government work?

MR. RICHARDS: Principally the work by Weisberger.

MR. WILLIAMSON: It is the excavation?

MR. RICHARDS: Yes.

MR. WILLIAMSON: That has nothing to do with this contract, if the Court please, that is force account. As I understand, it goes to all the work the

(Testimony of Theodore Weisberger.)

government did in excavation, the amount of work the government did.

MR. RICHARDS: The purpose of it is to show the condition of the canal in the first year up to the time the work stopped that fall.

MR. WILLIAMSON: You haven't made any contention—

THE COURT: I think it is pretty well covered by the evidence. Mr. Weisberger testified to it fully. There seems to be no dispute over it, probably not necessary to take up the time offering even the testimony. My recollection is Mr. Weisberger testified the excavation was complete to the first tunnel, or something of the kind, about seven thousand feet.

MR. RICHARDS: I desire to recall Mr. Weisberger.

THEODORE WEISBERGER, recalled as a witness on his own behalf, further testified as follows:

Q. (Mr. Richards): Mr. Weisberger, were you familiar with the condition of the road in the canyon leading up to your works in November, 1907?

A. I was. I passed over it several times.

Q. What was its condition?

A. On November 4th—

Q. (Mr. Cain): What is this?

A. (Continuing) November 4, 1907, at the point where Log Slide tunnel was eliminated and an open canal put around, this canal come directly over the road (showing), and on that date—a camp was established two days before, and on the 12th they began to

(Testimony of Theodore Weisberger.)

open that canal and threw material down on the road and absolutely closed it and forced the traffic across the river at this point (showing), and to get back to the road had to come back and ford again to the south side (showing). There was a steep hill along here (showing)—I refer now to the north side—that prevented passing up the river to connect with the road near what was called Camp Two and it was necessary to ford back across the river.

Q. Are there any other places where that was obstructed?

A. Not at this particular time.

Q. Was Mr. Jacobs insisting at that time on your hauling cement up there?

A. He was insisting and was giving me instructions.

THE COURT: That was gone into. The letter was written, I think, showing the demand at that time.

MR. RICHARDS: That was in January.

Q. Did he write you about this time something about having a certain amount of cement up there?

A. He advised me that I should have eight hundred barrels of cement on hand at the camps.

Q. And he was urging you to haul this?

A. Yes.

Q. Did your teamster have any difficulty or refuse to haul at that time?

A. He refused to haul on the basis of his contract whereby he was to receive four dollars and a half

(Testimony of Theodore Weisberger.)

for each ton on the grounds, that he could only haul about half a load across the ford, and he refused, and I wanted to get my cable equipment up there and installed ready for the next year's work, and I paid him then on a basis of seven dollars and a half per day for each four horse team, eliminating the tonnage proposition. The last twelve loads of material that went up to the camp were hauled on the basis of day labor instead of on the tonnage basis.

MR. RICHARDS: That is all.

Q. (Mr. Williamson) Did you put in any claim for that work in November?

A. I did not.

MR. WILLIAMSON: That is all.

(Witness excused.)

MR. RICHARDS: If the Court please, we are ready to close. I would like to ask, though, if he gets here before the case closes, to put on Mr. Fechter to corroborate Mr. Weisberger about the bank credit. He is out of town and expects to be here today, and if he should arrive in town before the case closes I would like to put him on to corroborate that.

MR. WILLIAMSON: We will agree to that.

THE COURT: Proceed with the rebuttal, then.

MR. CAIN: Now, if the Court please, at this time we move the Court to strike the evidence concerning the suspension of this contract, for the reason that, admitting it all to be true, it does not show a

fraud upon the part of the Secretary of the Interior, such gross mistake as would imply bad faith, or that the defendant was prevented from completing the contract by any wrongful act upon the part of the government.

THE COURT: You can interpose any motion you have to make at the close of all the testimony. I am not going to try this case but once. The motion will be denied for the present. Call your witnesses.

MR. CAIN: The only evidence, Your Honor, that we will put on now is a matter concerning which the engineers will want a few minutes to make an estimate, will just simply be this question as to what outlay in money would have been required by the defendant in order to bring his equipment up to a condition that would have rendered it possible to have completed the contract within the contract period. That is all the evidence.

MR. RICHARDS: We certainly would object to that question, if the Court please, because I don't think that would be any evidence against this defendant. He might have bought his equipment, or rented it, or any other way. He might have had somebody give it to him. Their estimate of what it might have cost, the price for which they might buy it, might be entirely different from what he might buy it. The question is whether he was broke at the time this thing happened, not what he might have to pay for some more equipment. Their estimate of that would be no criterion. Might buy it in the

market at an entirely different figure, 25% or 10% of what they would estimate it would be worth.

MR. CAIN: A man's financial condition, assuminig it to be as stated by Mr. Weisberger, might enable him to complete one contract and yet render him wholly incapable of completing another one. It is only for the purpose of showing what outlay would have been necessary and comparing it with his financial ability.

THE COURT: I think the testimony is rather remote. If you assume he had a profitable contract, one he could carry through without loss, I can very well see how he might raise the money and pay it back when he was paid by the government. I think the testimony as to what he would have to pay for an outfit is rather remote, assuming he would have to pay cash for it. His financial condition is fully before the jury, if I am the judge of it.

MR. CAIN: Well, if that is the Court's ruling then we will offer that.

THE COURT: I think it is too remote. I will sustain the objection to the offer.

Objection. Sustained. Exception.

MR. CAIN: I think, then, that is probably all of the testimony.

MR. WILLIAMSON: One letter which I now think ought to be offered in evidence. The defendants yesterday read to the jury and introduced in evidence a copy of report made by local engineer on Mr. Weisberger's application for extension of time. I now want—

MR. RICHARDS: It is the letter extending the time?

MR. WILLIAMSON: It is the letter of Mr. Weisberger asking for an extension. The letter of the extension and letter granting the extension I think should go in.

THE COURT: Any objection? Mr. Weisberger explained its contents, didn't he?

MR. WILLIAMSON: He did, but Mr. Richards objected to it and I withdrew it before it was read.

MR. RICHARDS: I object to it as not evidence binding upon the defendant in regard to the time of completion of the road, or as to what his rights were in regard thereto, otherwise the letter—

THE COURT: It will go in with his explanation of it. He has already explained the letter. You may read it to the jury.

MR. RICHARDS: Exception to the admission of it. (Letter referred to, dated July 5, 1907, received in evidence, marked Plaintiff's Exhibit "7" and read to the jury.)

MR. WILLIAMSON: I think we want to offer one or two photographs in order that some of this testimony may be made more clear.

MR. CAIN: It will be agreed these all go in?

MR. RICHARDS: Yes. If you want to identify them—

MR. CAIN: It is merely for the purpose of showing the manner in which it was constructed.

(Photographs referred to received in evidence and marked Plaintiff's Exhibit "8" to "18" inclusive).

MR. CAIN: That is all, Your Honor.

THE COURT: You want to hold the case open or close it now?

MR. CAIN: We are willing to close now.

MR. RICHARDS: We are willing to close now.
(Jury withdrawn.)

MR. CAIN: Now, if the Court please, at this time the government desires to make a motion for a directed verdict on the ground there is nothing in the evidence produced by the defendant which shows that the suspension of this contract was broad enough or that it was effected by anything that was untrue.

THE COURT: As I stated a while ago, this Court does not desire to try this case more than once. I will submit it to the jury. So far as these changes are concerned, I apprehend they are authorized by the contract.

MR. RICHARDS: There is a provision in the contract the government may make changes, but I don't thing, if Your Honor please, that that applies to this proposition. Here are changes made after the government took this over that are verly likely to very materially affect the cost of this work.

THE COURT: I presume all these matters were adjusted in the accounting?

MR. RICHARDS: I don't know, and even if they were would it be conclusive?

THE COURT: I do not think the power of the government was limited in any way when it took over the work. It had the same power to make

changes afterward as before. Of course, if it made changes that increased the expense it would have to pay these changes out of the treasury.

(Argument by counsel.)

THE COURT: I think these changes are clearly within the contract. There are only two questions I will submit to the jury. I will hold, as a matter of law, that the Secretary of the Interior actually suspended this contract on the 2nd day of February, 1908. That is purely a question of law. It depends on the construction of a written instrument. And I will hold the burden is on you to show that the Secretary of the Interior was guilty of actual fraud, or acted in such a gross disregard of defendant's rights fraud will be implied. I will instruct them that the accounting made by the engineer is final between the parties and that the burden is on you to show it is incorrect. Thirdly, that they acted fraudulently or that there was such gross error in the methods pursued by them that fraud will be implied. These are the only questions I see in the case. I will submit to the jury the question as to whether or not the contract is possible of performance.

There being no further evidence offered on either side the respective counsel proceeded with the arguments to the jury.

INSTRUCTIONS OF THE COURT.

Gentlemen of the jury, while the testimony in this case has in some respects taken a wide range, the questions which I deem it necessary and proper to submit to you are few and simple.

It is admitted in the pleadings, and was admitted on the trial, that on the 5th day of January, 1907, the defendant Weisberger entered into a contract with the United States for the consrtuction of those portions of the Tieton canal in this county which are designated on the specifications as "Schedule 6A and 7A", and the entire work to be completed by March 31, 1908. The time for completing the work specified on Schedule 6A was later extended to August 1, 1908, and the work covered by Schedule 7A until Octoper 15, 1908.

Weisberger commenced work under this contract soon after its execution and prosecuted the work until on or about the first day of February, 1908. On the 2nd day of February, 1908, the Secretary of the Interior suspended the contract and thereafter the government took charge of the canal and completed the work covered by the Weisberger contract on or about the 10th day of November, 1909, with certain departures and variations which have been disclosed by the testimony.

The Chief Engineer of the Reclamation Service has determined that the cost to the government of completing the canal was the sum of \$51,095.05 in excess of the contract price, and this action is brought to recover from the contractor that amount. At the date of the execution of the contract the defendant Empire State Surety Company entered into a bond in the penal sum of \$45,000.00 conditioned for the faithful performance of this contract by the defendant Weisberger, and the government likewise seeks to

recover from the Surety Company the full penalty of this bond with interest.

Section 22 of the specifications provides as follows:

“Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or if at any time the contractor is not properly carrying out the provisions of his contract in their true intent and meaning, notice thereof in writing will be served upon him, and should he neglect or refuse to provide means for a satisfactory compliance with the contract within the time specified in such notice, the Secretary of the Interior in any such case shall have the power to suspend the operation of the contract. Upon such suspension the Secretary of the Interior may take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under the contract, and may appropriate all material and supplies of any kind shipped or delivered by or on account of the contractor for use in connection with the work, and he may use the same for the completion of the work either directly by the United States or by other parties for it; the Secretary of the Interior may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery,

tools, appliances, materials, supplies and animals at the contractor's expense as may be necessary for the proper conduct of the work and for the completion thereof. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties who shall be liable therefor. In the determination of the question whether there has been such non-compliance with the contract as to warrant the suspension thereof, the decision of the Secretary of the Interior shall be binding on both parties."

Section 8 of the specifications provides that:

"The word 'Engineer' used in these specifications or in the contract, unless qualified by the context, means the Chief Engineer of the Reclamation Service. He will be represented on the work by assistants and inspectors with authority to act for him and direct the work. Upon all questions concerning the execution of the work, the classification of the material in accordance with the specifications and the determination of the costs, the decision of the Chief Engineer shall be binding on both parties."

Acting under the first of these provisions the Secretary of the Interior suspended the contract and took over the work and completed the canal. Under the second of these provisions the Chief Engineer of the Reclamation Service has determined the cost, and I will now instruct you as to the effect you must give to the determination of these two officers.

And first: If a party by his contract charge himself with an obligation possible to be performed

he must make it good, unless his performance is rendered impossible by the act of God, the law or the other party. Difficulties even if unforeseen and however great will not excuse him. If the parties have made no provision for a dispensation the rule of law gives none—nor in such circumstances can equity interpose.

The first question for your determination, therefore, is: Was this contract impossible of performance? The impossibility here referred to is a physical impossibility. If the contract could be performed, no matter how difficult or how expensive the performance might be to the contractor, he is bound by his obligation and Courts and juries can afford him no relief.

Again: It is competent for parties to a contract of the nature of the present one to make it a term of the contract that the decision of an engineer or other officer of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the Courts.

I therefore charge you as a matter of law that the decision of the Secretary of the Interior suspending this contract and the determination by the Chief Engineer of the Reclamation Service of the cost of completing the contract after suspension, are conclusive upon you, unless you find from a preponderance of the testimony that these officials were

guilty of fraud or committed such gross mistakes as would necessarily imply bad faith on their part.

You are further instructed that it is a presumption of law that the officers of the government entrusted with the enforcement of the law have exercised an honest judgment in the performance of their respective duties. In this case the presumption is that the Secretary of the Interior, in the action taken by him in suspending or assuming to suspend the contract with the defendant Weisberger, exercised such judgment; but you are also instructed that this is not a conclusive presumption, but may be overcome by a preponderance of the testimony.

If you should find from the preponderance of the testimony in this case that the Secretary of the Interior in suspending or assuming to suspend the contract with the defendant was so misinformed as to the facts surrounding the contract and its performance by the defendant, and that the Secretary was so grossly mistaken in such action that he was thereby prevented from exercising an honest judgment in the premises, and that his action based upon such misapprehension of the facts was so gross a mistake as to imply bad faith or fraud against the defendant, then the presumption of the exercise of an honest judgment on his part is overcome and your verdict should be for the defendant. In other words, gentlemen of the jury, it is not for you to say at this time whether the contract should be suspended or not under the facts disclosed before you. The question, and the only question with which you are concerned,

is: Did the Secretary exercise an honest judgment in that regard? Can you say from a preponderance of the testimony that he was guilty of a fraud or that in his action he so utterly disregarded the facts that fraud or bad faith on his part will be implied? If you can so state your verdict must be for the defendant.

I do not understand that any attempt has been made to impeach the determination of the Chief Engineer of the Reclamation Service as to the cost of completing this canal after suspension. True, there is some testimony tending to show that some changes were made in the mode of construction after the canal was taken over by the government, but these changes were specially authorized by the contract itself. Of course, if those changes increased the cost of construction such increased cost could not be charged against the contractor; but the presumption of law is that the Chief Engineer of the Reclamation Service only included in his determination proper elements of cost, and in this regard no attempt has been made to impeach his determination.

On this branch of the case, gentlemen, I will say that you must find that the contract was properly suspended in this case, unless you find from a preponderance of the testimony that the Secretary of the Interior acted fraudulently in suspending the contract or committed a mistake so gross as to necessarily imply bad faith on his part; and if you find that the contract was properly suspended you will return a verdict in favor of the plaintiff and against the de-

fendant Weisberger for the full amount shown by the determination of the Chief Engineer of the Reclamation Service and against the Surety Company for the full penalty of the bond, less a deduction for rental of the warehouse at Naches City, which I have made, gentlemen, in the form of verdict which I have prepared for you.

You, gentlemen of the jury, are the sole judges of the facts in this case.

You will observe, from what I have said, that I submit but two questions to you. One is, was this contract possible of performance at the time it was entered into? The other is, was the Secretary of the Interior guilty of fraud, or did he commit such a gross mistake that fraud on his part would necessarily be implied? In this matter the Secretary of the Interior represented the government, he represented the property owners who would be affected by his decision, and he represented the defendant here. It was his duty to act fairly towards all of them. Can you say, in the face of the testimony, that he did not?

In determining that question you have the right to take into consideration the extent of the contract. You have the right to consider how long work had progressed under it and how far the contract had been completed, the financial ability and the ability of the defendant in other respects to consummate the contract, and all the other facts and circumstances given in evidence here.

Some question was presented here as to the failure or refusal of the defendant to make a financial state-

ment to the Secretary of the Interior. I charge you that under the contract he violated no provision of the contract when he failed to make any such statement, but, nevertheless, in making a determination of the question which the contract vested in the Secretary of the Interior that was a proper matter for him to enquire into, and he had a right to demand such statement in order to reach a proper conclusion.

These, gentlemen of the jury, are the only instructions I deem necessary for your guidance. In arriving at your verdict you will carefully consider and compare all the testimony in the case. You will consider the demeanor of the witnesses upon the stand, their interest in the result of your verdict, if any such interest is shown, their knowledge of the facts in relation to which they testified, their opportunity for hearing, seeing or knowing those facts and all the facts and circumstances given in evidence and surrounding them. The government asks nothing but justice at your hands. If it has wrongfully terminated this contract you should so find and return a verdict for the defendant. On the other hand, you have no dispensing power; you have no power to relieve a man from an improvident contract. Between these two contentions you and you alone must determine.

I have prepared the form of verdict as I have indicated, fixing the amount you will find against the defendant Weisberger and the amount you will find against the surety company in case you find for the plaintiff, otherwise your verdict will simply be for the defendants.

MR. RICHARDS: We stipulate at this time we may take exceptions to the instructions given and the instructions refused any time after the jury comes in.

MR. CAIN: Yes.

THE COURT: Yes, at any time.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER, and EMPIRE SURETY COMPANY,

Defendants.

The plaintiff having heretofore and within the time provided by law and the rules of this Court, duly and regularly served on the defendants in the above-entitled cause its proposed Bill of Exceptions in said cause, and the time for proposing amendments thereto by said defendants having expired, and no amendments having been proposed, the said proposed Bill of Exceptions having been delivered to the clerk of this Court, and by him duly delivered to the undersigned judge for settlement, and the parties consenting to this order and certification, it is hereby

ORDERED that the foregoing Bill of Exceptions hereto annexed is hereby approved, allowed, settled and certified as a true, full and correct Bill of Exceptions in this cause, and it is further hereby certified that the same contains all of the evidence, matters

and proceedings had and taken upon the trial of said cause. And the said Bill of Exceptions is hereby made a part of the record in said cause.

Done in open Court this 15th day of November, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Bill of Exceptions, Filed November 15, 1912. W. H. Hare, Clerk, by F. C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington Southern Division.,
No. 73.*

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY,

Defendants in Error.

ASSIGNMENT OF ERRORS.

Plaintiff herein hereby assigns the following errors committed by the District Court:

1. That the Court erred in denying plaintiff's motion for judgment at the conclusion of plaintiff's testimony.
2. That the Court erred in denying plaintiff's motion for judgment at the conclusion of all the testimony in the case.
3. That the verdict herein is contrary to the evidence and against the law.

4. That the Court erred in entering judgment herein in favor of the defendants, and erred in entering judgment upon the verdict.

5. That the Court erred in denying plaintiff's motion for judgment notwithstanding the verdict of the jury.

WHEREFORE, Plaintiff in error prays that the judgment of the District Court herein be reversed and the District Court directed to grant plaintiff the relief prayed for in its complaint.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney,

(Signed) RALPH B. WILLIAMSON,

Special Assistant to the United States Attorney.

Endorsements: Service of a copy of the within Assignment of Errors is hereby admitted, this 1st day of November, 1912.

(Signed) PARKER & RICHARDS,

JOHN P. HARTMAN and

McAULEY & MEIGS,

Attorneys for Defendants.

Assignment of Errors. Filed October 13, 1912.
W. H. Hare, Clerk, by Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY,

Defendants in Error.

The United States of America, plaintiff herein, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 30th day of September, A. D., 1912, comes now by Oscar Cain, United States Attorney; E. C. Macdonald, Assistant United States Attorney, and R. B. Williamson, Special Assistant to the United States Attorney, and petitions said Court for an order allowing the United States of America to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

(Signed) OSCAR CAIN,

United States Attorney,

(Signed) E. C. MACDONALD,

Assistant United States Attorney,

(Signed) R. B. WILLIAMSON,

Special Assistant to the United States Attorney.

On consideration of the foregoing petition and assignment of errors attached thereto, the Court does

allow the writ of error of the plaintiff, United States of Ameritca.

Dated this 30th day of October, A. D., 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Service of a copy of the within Petition for Appeal and order allowing same is hereby admitted this 1st day of November, 1912.

(Signed) PARKER & RICHARDS,

JOHN P. HARTMAN and

McAULEY & MEIGS,

Attorneys for Defendants.

Petition for Writ of Error and Order allowing same. Filed October 30, 1912. W. H. Hare, Clerk, by S. M. Russell, Deputy.

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY,

Defendants in Error.

WRIT OF ERROR (LODGED COPY.)

THE UNITED STATES OF AMERICA,

NINTH JUDICIAL CIRCUIT.

ss.

THE PRESIDENT OF THE UNITED STATES
to the Honorable, the Judges of the District Court

of the United States for the Eastern District of Washington, Southern Division, GREETING:

Because of the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America, Plaintiff in Error, and Theodore Weisberger, Jane Doe Weisberger and Empire State Surety Company, Defendants in Error, a manifest error hath happened to the great damage to the said United States of America, Plaintiff in Error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 29th day of November next, in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States,

the 30th day of October in the Year of Our Lord
One Thousand Nine Hundred and Twelve.

W. H. Hare, Clerk of the United States District
Court for the Eastern District of Washington,
by S. M. Russell, Deputy.

(SEAL.)

Allowed by Frank H. Rudkin, District Judge.

Endorsements: Service of a Copy of the within
writ of Error is hereby admitted, this 1st day of
November, 1912.

(Signed) PARKER & RICHARDS,
JOHN P. HARTMAN and
McAULEY & MEIGS,

Attorneys for Defendants.

Writ of Error (Lodged Copy.) Filed October 30,
1912. W. H. Hare, Clerk, by S. M. Russell, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY,

Defendants in Error.

CITATION. (LODGED COPY.)

UNITED STATES OF AMERICA) ss.

THE PRESIDENT of the United States to Theo-

dore Weisberger, Jane Doe Weisberger and Empire State Surety Company, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Eastern District of Washington, Southern Division, wherein the United States of America is Plaintiff in Error, and you, the said Theodore Weisberger, Jane Doe Weisberger and Empire State Surety Company are Defendants in Error, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 30th day of October, A.D., 1912 and in the Independence of the United States the one hundred and thirty-seventh.

(Signed) FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington.

(SEAL.)

W. H. HARE, Clerk of the United States Court for the Eastern District of Washington, by S. M. RUSSELL, Deputy.

Endorsements: Service of a copy of the within Cita-

tion is hereby admitted this 1st day of November, 1912.

(Signed) PARKER & RICHARDS,
JOHN P. HARTMAN and
McAULEY & MEIGS,

Attorneys for Defendants.

Citation (Lodged Copy.) Filed October 30, 1912.
W. H. Hare, Clerk, by S. M. Russell, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY,

Defendants in Error.

I HEREBY CERTIFY that in my opinion the original papers in the above entitled cause, hereinafter designated, should be inspected by the Circuit Court of Appeals, on the appeal herein and I, therefore, direct the Clerk of this Court to transport the same to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit said papers being as follows:

Plaintiff's Exhikit 5, in support of Statements 1
to 14, inclusive.;

Photographs of the work involved in this cause,
being eleven in number;

Plaintiff's Exhibit 1, being the contract, proposal and specifications for main canal, Tieton Project; Plaintiff's Exhibit 1, being contract drawings, main canal, Tieton Project;

Plaintiff's Exhibit 3, being certified copy of certain Departmental files.

Dated this 17th day of December, A. D., 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order to transmit original exhibits. Filed December 19, 1912. W. H. Hare, Clerk, by Edward E. Cleaver, Deputy.

In the United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEISBERGER and EMPIRE STATE SURETY COMPANY, Defendants in Error.

It appearing to the Court that it is necessary to further extend the time for the Plaintiff in Error in the above entitled cause to prepare, file and serve the Record on Appeal, and the time having been heretofore extended to January 20th, 1913; NOW, THEREFORE; it is hereby

ORDERED, under and pursuant to Rule Sixteen (16) of the Rules of the United States Circuit Court of Appeals, that the Plaintiff in Error shall have, and it is hereby allowed until and including the 1st day of February, A. D., 1913, in which to prepare, serve and

file the Record herein with the Clerk of the United States Circuit Court of Appeals, at San Francisco, California.

Done in open Court this 14th day of January, A. D., 1913. (Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Order extending time for printing record to February 1, 1913.

*In the District Court of the United States, for the
Eastern District of Washington Southern Division.*
No. 73.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY,

Defendants in Error.

To the Clerk of the United States District Court
for the Eastern District of Washington, Southern
Division:

YOU ARE HEREBY REQUESTED, in making
up your return to the citation on appeal herein, to
include therein, the following:

Amended Complaint;

Answer of defendants Weisberger to amended com-
plaint;

Answer of defendant Empire State Surety Company
to amended complaint;

Reply to amended answer of defendants Weisberger;

Reply to amended answer of defendant Empire State Surety Company;

Verdict;

Motion for judgment notwithstanding the verdict;

Opinion of Court denying plaintiff's motion;

Judgment;

Assignment of errors;

Petition for appeal and order allowing same;

Notice of filing Bill of Exceptions;

Bill of Exceptions;

Writ of Error;

Citation;

Admission of service of Bill of Exceptions;

Order extending time for Printing Record until January 2, 1913. Order extending time for printing record to January 20, 1913. Order extending time for printing record until February 1, 1913. Order to transmit original Exhibits to C. C. A. which comprise all of the papers, records and other proceedings which are necessary at the hearing of the appeal in the United States Circuit Court of Appeals, and that no other papers, records or other proceedings than those above mentioned need be included by the Clerk of said Court in making up his return to said citation as a part of such record.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

(Signed) RALPH B. WILLIAMSON,
Special Assistant to the United States Attorney.

Endorsements: Received a copy of the within praecipe for record, this 20th day of November, 1912.

(Signed) PARKER and RICHARDS,
Attorneys for Defendants Weisberger.

(Signed) JOHN P. HARTMAN and
McAULEY & MEIGS,
Attorneys for Defendant Empire Surety Company.

Praecipe for transcript of record. Filed November 14, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY,

Defendants in Error.

To the Clerk of the United States District Court for the Eastern District of Washington, Southern Division:

YOU ARE HEREBY REQUESTED, in making up your return to the citation on appeal herein, to include the following Exhibits in addition to the papers designated in the Praecipe heretofore filed with you:

Plaintiff's Exhibit 6;

Plaintiff's Exhibit 7;
Defendants' Exhibit "H";
Defendants' Exhibit "M";
Defendants' Exhibit "M";
Defendants' Exhibit "N";
Defendants' Exhibit "O";
Defendants' Exhibit "T";
Defendants' Exhibit "U";
Defendants' Exhibit "V";
Defendants' Exhibit "W";
Defendants' Exhibit "X";

ALSO notice served on Theodore Weisberger, dated at North Yakima, Washington, January 2, 1908, signed by Charles H. Swigart, Project Engineer, introduced in evidence, but inadvertently not marked with an Exhibit number.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

(Signed) RALPH B. WILLIAMSON,

Special Assistant to the United States Attorney.

Endorsements: Received a copy of the within Supplemental Praecipe for Record, this ----- day of December, 1912.

(Signed) PARKER & RICHARDS,

Attorneys for Defendants Weisberger.

(Signed) JOHN P. HARTMAN and

McAULAY & MEIGS,

Attorneys for Defendant Empire Surety Company.

Supplemental praecipe for Transcript of Record.
Filed December 11, 1912. W. H. Hare, Clerk. By
S. M. Russell, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Southern Division.*

No. 73.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE WEISBERGER, JANE DOE WEIS-
BERGER and EMPIRE STATE SURETY
COMPANY, a Corporation,

Defendants.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
RECORD.

UNITED STATES OF AMERICA,
Eastern District of Washington.

ss.

I, W. H. HARE, Clerk of the District Court of the
United States for the Eastern District of Washington,
do hereby certify that the foregoing printed pages
numbered from 1 to 408 inclusive, to be a full, true,
correct and complete copy of so much of the record, ex-
hibits, papers and other proceedings in the foregoing
entitled cause as called for by the plaintiff and plain-
tiff in error in its praecipe and supplemental praecipe
as the same appear on pages 404 and 406 of this
printed record, as the same remain of record and on
file in the office of the Clerk of said District Court,
and that the same constitute the record on Writ of

Error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which Writ of Error was lodged and filed in my office October 30, 1912.

I further certify that I transmit with the record herein original exhibits on file in said action as follows: Plaintiff's Exhibit "1," being the contract, proposal and specifications for main canal, Tieton Project. Plaintiff's Exhibit "1," being contract, drawings, main canal, Tieton Project. Plaintiff's Exhibit "3," being certified copies of certain Departmental files. Plaintiff's Exhibit "5," in support of Statements 1 to 14, inclusive, and photographs of the work involved in this cause, being eleven in number, which original exhibits I transmit herewith pursuant to order of this Court so to do, which order will be found on page 402 of this printed record.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that the cost of the printer for printing the foregoing transcript amounts to the sum of \$421.00, which sum has been paid in full to the printer by the plaintiff and plaintiff in error, United States of America.

I further certify that the fees of the Clerk of this Court for preparing copies for printer, supervising, proof reading and certifying to the foregoing printed record amounts to the sum of \$240.90, which sum will

be included in my quarterly account as Clerk against the United States, plaintiff and plaintiff in error, for the quarter ending March 31, 1913.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 15th day of January, 1913.

(Signed) W. H. HARE,
Clerk.

(Seal.)

IN THE

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United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THEODORE WEISBERGER and
MAUDE WEISBERGER, Husband
and Wife, and THE EMPIRE
STATE SURETY COMPANY,
Defendants in Error.

No.

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON.

BRIEF OF PLAINTIFF IN ERROR

IN THE CIRCUIT COURT OF APPEALS OF
THE UNITED STATES, FOR THE
NINTH CIRCUIT.

STATEMENT OF CASE.

This is a suit upon a contract and a bond made part of that contract, both executed by Theodore Weisberger and Maude Weisberger, husband and wife, and by The Empire State Surety Company as surety on the bond with the United States Government, which said contract was entered into by the defendants in error on the 5th day of January, 1907, and covered the construction of certain parts of the Tieton Main Canal of the Yakima-Tieton Reclamation Project of the United States Reclamation Service in Washington.

The portions of this work undertaken to be constructed by the defendants in error are designated as Shedule 6-A and Schedule 7-A; the contract and specifications, which are made a part of the pleadings in this case and the work embraced in each two schedules consisted: first, of manufacturing concrete shapes for canal and tunnel linings and for flumes, and, second, of placing these shapes in excavated canals and joining the same together in order to form a continuous solid concrete canal.

Under the original contract, the entire work was to be completed by March 31, 1908. The work specified on Schedule 6-A, that is, manufacturing said shapes, was later extended to August 1, 1908, and

the work covered by 7-A, that is, the placing of such shapes, was extended until October 15, 1908.

The specifications, among other things, contained the following provisions:

8. Engineer.—The word “engineer” used in these specifications or in the contract, unless qualified by the context, means the Chief Engineer of the Reclamation Service. He will be represented on the work by assistants and inspectors with authority to act for him and direct the work. Upon all questions concerning the execution of the work, the classification of the material in accordance with the specifications, and the determination of costs, the decision of the Chief Engineer shall be binding on both parties.

11. Local Conditions.—Bidders must satisfy themselves as to all local conditions affecting the work, and no information derived from the maps, plans, specifications, profiles, or drawings, or from the engineer or his assistants, will in any way relieve the contractor from any risk or from fulfilling all the terms of his contract. The accuracy of the interpretation of the facts disclosed by borings or other preliminary investigations is not guaranteed. Unless the bidder or his representative has visited the site of the work and made himself familiar with the conditions his bid on work depending on local conditions will not be considered.

22. Suspension of Contract.—Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or if at any time the contractor is not properly carrying out the provisions of his contract in their true intent and meaning, notice thereof in writing will be served upon him and should he neglect or refuse to provide means for a satisfactory compliance with the contract within the

time specified in such notice, the Secretary of the Interior in any such case shall have the power to suspend the operation of the contract. Upon such suspension the Secretary of the Interior may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and may appropriate all materials and supplies of any kind, shipped or delivered by or on account of the contractor for use in connection with the work, and he may use the same for the completion of the work either directly by the United States or by other parties for it; or the Secretary of the Interior may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, supplies and animals at the contractor's expense as may be necessary for the proper conduct of the work and for the completion thereof. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. In the determination of the question whether there has been such non-compliance with the contract as to warrant the suspension thereof, the decision of the Secretary of the Interior shall be binding on both parties.

25. Changes in quantities.—The Secretary of the Interior reserves the right to make such changes in the quantities of work or material as may be deemed advisable without notice to the surety or sureties on the bond given to secure compliance with the contract, by adding thereto or deducting therefrom, at the unit prices of the contract. These changes will include modifications of shapes and dimensions of canals, dams, and structures of whatsoever nature, particularly foundation work, to suit conditions disclosed as the work progresses. Should any change be made in a particular piece of work after it has been commenced, so that the contractor is put to extra expense, the engineer will make reasonable allowance therefor,

which action shall be binding on both parties. Extra work or material will be paid for as hereinafter provided.

27. Changes at contractor's request.—Should the contractor by reason of conditions developing during the progress of the work find it impracticable to comply strictly with the specifications, and apply in writing for a modification of structural requirements or methods of work, such change may be authorized by the engineer provided it be not detrimental to the work and be without additional cost to the United States.

The contractor commenced work under this contract soon after its execution, and prosecuted the work with varying degrees of diligence until on or about the first day of February, 1908. On the second day of February, 1908, the Secretary of the Interior, relying on the powers reserved in paragraph 22 of the said contract above quoted, suspended the contract, took over the materials, supplies and equipment used by the contractor on said work, and completed the work covered by the said contract on or about the 10th day of November, 1910.

Certain minor changes were made during the said construction which the Court below found were, in each and every instance, authorized by the contract. The cost of completing the work exceeded the original contract price bid by the defendants in error in the sum of \$51,095.05. This sum was determined by the Chief Engineer of the Reclamation Service to have been the excess cost of completing said work, said determination made in accordance with paragraph 8 of the contract above quoted.

This action was brought to recover said excess cost from the contractor and his surety, the Empire State Surety Company, which, at the date of the execution of the contract, entered into a bond to the United States in the penal sum of \$45,000.00, conditioned for the faithful performance of this contract by the defendant Weisberger, and the government likewise sought to recover from the Surety Company the full penalty of its bond, with interest.

The complaint of the plaintiff, the United States of America, in this action, set up the contract and bond and alleged the facts hereinbefore recited. The defendants in error, Weisberger and wife, answered thereto, denying the material allegations of the complaint and setting up six alleged affirmative defenses and three counterclaims and set-offs.

The defendant, the Empire State Surety Company, also answered, generally denying the complaint and setting up four affirmative defenses to the said complaint. To each of these answers the plaintiff replied by way of general denial.

The counterclaims of the defendant Weisberger were dismissed by the Court on the ground of his lack of jurisdiction.

The evidence of the defendant Weisberger and the Empire State Surety Company at the trial raised two issues:

First, Did the Secretary of the Interior in suspending this contract act fraudulently in fact or in law?

Second, Was the contract as originally entered into, possible of performance?

No attempt was made to impeach the decision of the Chief Engineer of the United States Reclamation Service as to the accounting.

This case came on for hearing in the District Court of the United States for the Eastern District of Washington, the Honorable Frank H. Rudkin, J. presiding, on the 9th day of February, 1912, and was tried before a jury duly and regularly empanelled. After hearing the evidence and the arguments of counsel on both sides, the jury returned verdict on the 24th day of February, 1912, for the defendants. Thereafter the plaintiff filed a motion for judgement notwithstanding the verdict, which motion was argued, the Court rendering his opinion (Record-52), said opinion denying the motion.

ASSIGNMENT OF ERRORS.

The plaintiff in error hereby assigns the following errors committed by the District Court:

First: That the Court erred in denying plaintiff's motion for judgement at the conclusion of plaintiff's testimony.

Second: That the Court erred in denying plaintiff's motion for judgment at the conclusion of all the testimony in the case.

Third: That the verdict herein is contrary to the evidence and against the law.

Fourth: That the Court erred in entering judgment herein in favor of the defendants, and erred in entering judgment upon the verdict.

Fifth: That the Court erred in denying the plaintiff's motion for judgment notwithstanding the verdict of the jury.

ARGUMENT.

The Court in its opinion denying the plaintiff's motion for judgment notwithstanding the verdict finds that the action of the Secretary of the Interior in suspending the contract was not fraudulent either in fact or in law as against these defendants, and, so far as the verdict may have been based upon such finding, it is set aside by the Court in its opinion.

The only issue therefore before this Court is whether or not said contract was impossible of performance as originally made, and the plaintiff in error strenuously contends that there is no evidence in the record to support such finding by the jury, and that the jury's verdict was arbitrary and not based upon facts, but the outgrowth of a natural sympathy due to the respective positions of the parties and the apparent hardship that would devolve upon the defendant in case of a verdict for plaintiff.

The theory of the defendants in the Court below was anomalous. Their two defenses were absolutely inconsistent. They claimed that the Secretary of the Interior acted fraudulently in suspending the contract and preventing defendant Weisberger from carrying

to completion his work, which he testified he was amply able to do and that he could and would have completed said work in accordance with its terms had the contract not been terminated, and, in the same breath, alleges and seeks to prove that the contract, as originally made, was impossible of performance in any event.

It would be a remarkable thing if this verdict were allowed to stand in view of the defendant's own testimony, given after due and deliberate consideration and in response to questions by his own counsel, that the work was possible of performance, and that it was possible of performance by him. The Court's attention is respectfully called to page 339 of the Transcript of Record, where Mr. Richards, counsel for defendant Weisberger, asks the following question:

"Q. Now, Mr. Weisberger, if the government had not suspended this contract or interfered with you, could you have completed the work which you had agreed to do, within the time granted after the extension by the government?

A. Yes, sir."

This feature of the defendant's case caused the trial court some difficulty, which is referred to in its opinion. At page 58 of the Record, the Court says:

"Indeed, it occurred to me at the trial that the defenses that the contract was impossible of performance, and that the Secretary of the Interior acted fraudulently in suspending the contract for failure to perform, was utterly inconsistent, and I am still of that opinion. * * * The attention of counsel for defendants was directed to this inconsistency on

the hearing of the present motion, and they explain their apparent inconsistency in this wise:—After the contract was suspended and after the government took over the work, it materially modified the method of joining the shapes in the canal. This change greatly lessened the difficulties and cost of construction. It is the contention of the contractor that he could have performed and completed the contract in the manner in which it was completed after this change was made, and not that he could have completed it according to its original terms.”

Reference to the above question and answer shows clearly, however, that this explanation was one originating at the time of the hearing on the motion.

Mr. Weisberger on the trial stated that he could have completed the work which he had agreed to do. There is no evidence in the record that he made any application under paragraph 27 of the contract, or under any other provision of the contract, for the particular change which he now claims was necessary to remove the alleged impossibility of performance, although for a period of more than one year he attempted to carry on said work.

The alleged impossibility, if it existed at the time on the original contract, was not a hidden impossibility. The specifications were clear and concise and the contractor's knowledge of conditions ample, as shown by his own testimony. It may have been impossible to have constructed the joint in the manner originally specified as cheaply as defendant in error had anticipated when he bid upon said contract, but this is not such impossibility as will excuse in law, and, upon defendant's own statement as above quoted, it was not

in his mind an impossibility either at the time of taking the contract, nor at the time of trial.

In showing the impossibility of performance, the defendants sought at the trial to rely upon two facts:

First, that the joint as originally specified, was impossible of building in accordance with the contract, and

Second, that certain flat lands in the Tieton Canyon which were designated as places for building shapes, were washed away by a flood. It was admitted by the defendant, however, that the flood complained of occurred some two months prior to the execution of this contract, and the Court properly excluded all evidence upon this point. (R-179).

In addition to these facts, much evidence was introduced by the defendant as to the condition of the road leading into the Tieton Canyon, agreed to be constructed by the government. The agreement with the government is shown in paragraph 47-A of the contract as originally advertised. The contract, as advertised, contemplated a number of features of construction work not bid upon by the defendant Weisberger, including excavation of the main canal and the building of concrete structures at the intake of the canal. Only the two schedules of the contract as advertised were let, the balance of the work having been done by the government forces.

The defendant alleges and seeks to prove default of the plaintiff in the matter of road construction in two respects:

First: That the road was never completed beyond the defendant's upper camp to the intake of the canal.

No real damage is claimed by defendant in his regard, however, since his only use for a road beyond his camp would be for the purpose of hauling the concrete shapes for the purpose of placing them in the canal above this point. Regarding this point, it was brought out on cross-examination (Weisberger R-229) as follows:

“Q. You say the road was constructed to Corral creek just below your last camp?

A. Yes.

Q. And never constructed up beyond that point?

A. Never constructed beyond a point about a quarter of a mile above our camp.

Q. No necessity for a road there, was there? Perfectly flat country, wasn't it?

A. There was a necessity, yes. There was no access to the upper end of the work without that road.

Q. That is, to the diverting dam?

A. To the upper end of our work.

Q. Was that feasible for you to have hauled the shapes from your upper camp on the road in any event?

A. No.”

It is shown in defendant's testimony, however, that actual hauling was done clear through to the diversion dam and intake (W. L. Dimmick, R.-268). In any event, it was not necessary for Mr. Weisberger's work that this road be completed, and the obligation of the government so far as building a road was concerned extended only to that taken by any contractor, and since defendant Weisberger had nothing to do with the excavation or the building of the diversion dam or intake works, and since on his own testimony

it was not feasible for these shapes to have been hauled in the road to the place of setting, in any event he was not injured by and cannot complain of this default even if it be admitted to be a default.

Nor is there any record that any complaint was ever entered by defendant Weisberger prior to the trial.

Second: Complaints were also made that the road was in bad condition for a time during the spring of 1907 below this point and over a portion of the country necessary to be traveled by Weisberger and his teams.

Admitting this to be true, the evidence does not show that Mr. Weisberger was hindered and delayed on this account for a longer period than that which has already been recongnized by the government and upon which an extension of time was granted. As stated in the testimony of defendant's witness W. L. Dimmick (R-268), the road was completed to defendant's camp in the latter part of May, 1907. This is corroborated by the testimony of defendant Weisberger (R-230), in which he states that the first load of machinery was taken through on May 28, 1907.

Whatever delay was caused on this account, it was undoubtedly waived by defendant Weisberger's application for extension of time upon this basis (Plaintiff's exhibit 7, R-82), in which he states that he computed the delay from bad roads to be four months, and which extension of time was granted. This has already been set forth in the Statement of Case.

Of the three reasons, therefore, set forth by defendant Weisberger as supporting his contention that the contract was impossible of performance, the only one necessary to be further considered is the question of joints, that is, the method and manner of joining one shape to another in order to form a continuous cement-lined canal.

The Court will obtain a clear understanding of this proposition by first referring to drawings Number 8-A and 10-A accompanying the contract and specifications, and also referring in connection therewith to the testimony of D. C. Henny (R-149-150-151 and 152); and also his testimony as to the dimensions of the shapes (R-167-168). As stated in that testimony, the shapes for lining the open canal shown on drawing 8-A were circular shapes extending around the circle somewhat more than the half circle, connected every two feet in the center of each shape, which is two feet long, by a cross bar. The walls of the shape were four inches thick; the diameter of the open canal shape 8 feet 3 5-8 inches.

The tunnel shapes were complete circles with a ~~radius~~^{diameter} of 6 feet 1 1-4 inches. Each of these units was to be placed in the open canal or in the tunnel, as the case might be, and cemented together. For this purpose, one edge of each shape was to be especially moulded, as shown on Drawing 8-A in the center of the page under the title "Detail of joint." This was placed next to the flat surface of the adjoining shape, and joined as shown on Drawing 10-A, upper left-

hand corner marked "Detail of Joint." The latter drawing is a standard or typical drawing of the joint, merely. It is not a specification, nor is there any definite requirement in the contract that the distance between each point of the edges of these shapes should be exactly one-eighth inch from a corresponding point on the edge of the adjoining shape. Such an interpretation is preposterous, and is not justified from such a drawing which represents only an illustration of standard or typical joint. Paragraph 118-A gives the engineer discretion in this matter, and paragraph 122-A merely requires "close bearing with the joint of the shape already made."

Mr. Weisberger states (R-206) that prior to the suspension of this contract, to-wit: about September 9, 1907, the government conceded one-eighth of an inch in radius in these shapes, which allowed a variation of one-half inch and of one-fourth inch in diameter, or, considering the two shapes, allowing the shapes to "vary one-half inch of coming together with flush faces when they were erected in the canal."

Apparently this relieved the difficulty and impossibility complained of at that time, since Mr. Weisberger testifies (R-396) that this concession on the part of the government gave great impetus to the construction of these shapes. All this was long prior to the date of suspension of the contract, and was never made the basis of a written request for change in structure such as is authorized by paragraph 27 of the specifications.

True, Mr. Weisberger testifies (R-215) that after he had tried to set these shapes up and found the difficul-

ties about joining them, he made an application for a change in the manner of lining the canal. The general impression from this testimony being that the change went to the manner of joining the shapes, since this is the matter complained of. As a matter of fact, however, Mr. Weisberger did not at that time, nor at any other time by any formal application make application for a change in this joint. In his cross-examination at page 235 of the Record, he stated as follows:

“Q. Mr. Weisberger, you stated yesterday that you made an application to the engineers for several changes. Did you at that time specifically ask them for the change in joint, as you testified yesterday, and did you answer that that was adopted by the government?”

A. No.”

and at pages 235 and 236:

“Q. Now, Mr. Weisberger, in your application for modification which you suggested yesterday that you made, is it not a fact that your application was an application to entirely abandon this kind of construction and adopt a method of construction which was more nearly like the type, the alternate type in the bid?”

A. Why, no; there was no resemblance between the two.

Q. Was it, however, a practical abandonment of this method of construction?

A. No.

Q. You intended to manufacture these shapes and place them in the canal if your application for modification of plans had been granted?

A. We intended to manufacture the exact dimensions of the circular part of the shape, and manufacture it in the canal instead of on these manufacturing sites.

Q. As a solid piece?

A. As a solid monolithic form of construction.

Q. Then your application did not go, as was the impression gathered from your testimony yesterday, to the exact change in joint which was afterwards made by the government?

A. No, there was nothing said about joints."

The testimony of the other witnesses for the defense on the matter of joints, Fred M. Crownholm, Herbert J. King, W. C. Bunce, and H. J. Doolittle, all base their testimony upon the assumption that the variation allowed between the changes of shapes of joints was one-eighth of an inch, whereas, as has already been shown, Mr. Weisberger testifies that this restriction was modified by the engineers early in September, and long before suspension.

However, even viewing the testimony of these witnesses on whom defendant relies mainly to support his contention of impossibility of performance, we find no such impossibility as will in law excuse performance.

Fred M. Crownholm, who was superintendent for Mr. Weisberger from the beginning of the work until the date of suspension, in his direct examination (R-301-302) testifies as follows:

"Q. Was it possible to make those shapes and place them one-eighth inch together and make a smooth joint, or make a one-eighth inch joint?

A. No."

On this testimony it should be noted that nowhere in the contract is there a requirement regarding smoothness of the joint, and it should also be noted in this connection, as before stated, that the

requirement of one-eighth inch joint was waived prior to the time any shapes were laid.

As stated in Mr. Weisberger's testimony before quoted, this waiver was made on September 9, 1907, and as stated in Mr. Crownholm's testimony (R-300), the contractor commenced laying shapes on September 15, 1907. Mr. Crownholm testifies (R-313) that the work which was actually done by them was accepted and remains part of the work. He also testifies at page 314 of the Record as follows:

"Q. The question of placing the shapes together, however, with the ridge between them, was what you were discussing then, as I understood you. Now that was the difficulty; it was not impossible to construct the canal; it was the difficulty or impossibility of leaving the edge smooth, was it not? Wasn't that your difficulty?

A. Yes; our difficulty, our only difficulties, as I understood them, were to have the work accepted.

Q. Then the question of impossibility was one of relative difficulty, was it not, and how far the government would go in accepting the work?

A. Yes."

He also states on page 313 that experience in this work was what they lacked at that time.

Defendant's witness William Charles Bunce testifies (R-322) that they actually made a number of shapes which were placed in the ditch and that these shapes were not taken out, but were accepted by the government.

Defendant's next witness upon this phase of the alleged impossibility was Herbert J. King, who testifies

as to the difficulty of manufacturing and placing these forms (R-329), as follows:

"Q. Now, from the experience that you had there, Mr. King, what would you say as to whether or not it was possible or impossible to line that canal with shapes constructed as this Exhibit "B," with a variation one-sixteenth and one-eighth of an inch?

A. I should say it would be practically impossible.

(Cross examination R-330).

Q. When you say 'practically impossible,' do you mean impossible or more difficult?

A. I think 'practically impossible' would cover it.

Q. You mean, then, it was not practicable?

A. I mean more than that.

Q. Not impossible? What do you mean?

A. Why, I mean economically impossible."

It also should be noted that this witness's testimony was based upon an assumption which did not in fact exist, and it is already shown that the Government had, prior to the beginning of laying any shapes by the defendant, modified this particular requirement.

Defendant also introduced the testimony of H. J. Doolittle, one of the Government Engineers on said work. He was asked the following question (R-286-7):

"Q. Now what were the difficulties that you discovered—some of the difficulties that you discovered, making it difficult or impossible to join the shapes properly as Weisberger was laying them?

A. Of course on a proposition of that kind, that was a new method and required special machinery and special devices for handling and placing; that naturally resulted in more or less difficulty until

the crew could be trained to handle such work as that successfully."

On cross examination Mr. Doolittle was asked (R-288):

"Q. Mr. Doolittle, do you know of your own knowledge whether or not the canal was actually constructed with the shapes?

A. It was completed with that type of lining."

It is true that the Government made some changes in the type of the joint used, such change being made after the work was taken over. Reference to this is made at various points through the testimony, but is more fully explained by Chief Engineer A. P. Davis (R-130).

"Q. Why did they change the manner of jointing those shapes, Mr. Davis?

A. There are two reasons—three reasons. One was that by means of an allowed variation they could more easily take curves with this form (showing). And another is that by allowing a wider opening, to be afterwards filled with concrete, the work was cheapened, because the placing could be done more rapidly and need not be quite so carefully done. It was done for the purpose of cheapening the work. Those two reasons are entirely means of cheapening the work. The third reason was, as illustrated by this piece that you have here, (showing), when two shapes were not in exact alignment the difference was taken up on a gradual slope here (showing) instead of a sudden offset between the two joining shapes."

The change, however, has become immaterial since the Court found, as a matter of law, that the changes were authorized by the contract, and there-

fore were contemplated by and part of the contract. (R-391).

Upon the question if impossibility of performance, therefore, we respectfully submit that there is not an iota of evidence to sustain such contention. On the other hand, there is ample evidence that the contract was possible of performance, not only from the testimony of the defendant's witnesses, as above quoted, but from the fact that the canal was actually constructed according to said contract, and no stronger evidence of the possibility of construction could be offered. (See testimony of D. C. Henney, Supervisions Engineer, R-170).

"Q. Mr. Henney, with the exception of the changes you have noted, was this canal constructed with the forms as you have described them?

A. Yes."

Not only was the canal actually completed under the contract, but *all* of the work ever done by Mr. Weisberger was accepted. He himself proved the possibility and feasibility of the design before the contract was suspended.

The only evidence introduced in rebuttal or considered necessary by plaintiff's counsel was the photographs referred to at page 383 of the Record as Plaintiff's exhibits 8 to 18, inclusive, which unfortunately are not a part of the record sent up to this Court.

It seems in the light of this evidence that there could be no serious contention that the contract was impossible of performance. In fact, we believe the

trial Court in its opinion above referred to, found that the contract was possible of performance. The Court in his opinion (R-59) says:

“Within these rules I doubt if it can be said that it was impossible to perform the obligation in question, but I am free to say that performance according to the terms of the original contract and specifications would have been extremely difficult and expensive.”

It is interesting to note that, although the trial Court refused to set aside the verdict of the jury in this case, he, in fact, refuses to act, having deducted from the evidence a conclusion which at the time of the instruction to the jury he apparently did not consider involved in the case, that is, that there was a mutual mistake at the time of entering into the original contract. It will be recalled that the Court in his instructions to the jury submitted to them but two questions (R-392):

First: Whether the contract was possible of performance; and,

Second: Whether the Secretary of the Interior was guilty of fraud.

He finds that as to the second question there is no evidence to support the allegations, and he practically finds, as above stated, that the contract was not impossible of performance—merely difficult and expensive.

In denying the motion for judgment notwithstanding the verdict, however, the Court bases his judgment as follows (R-60):

"It cost the Government fifty-one thousand dollars more than the contract price to complete the work. In addition to this it took over and used the plant, tools and appliances belonging to the contractor, which cost in the neighborhood of seventy thousand dollars. The changes made in the mode of construction after the contract was suspended greatly lessened the cost of construction, so that it is evident that the contract could not have been performed originally for less than almost double the contract price. I am inclined to the opinion that there was a mutual mistake of the parties as to the feasibility of the original plans adopted."

We have searched in vain through the transcript of record and have searched our recollection of the testimony at the trial, and can find no evidence to support the Court's statement that the cost would have been nearly double the contract price. It is true that Mr. Weisberger testified that seventy thousand dollars' worth of equipment was placed by him upon the work. It is equally true that under the contract the Government did not take the title to this machinery, but merely its possession for use upon this work. There is nothing in the evidence as to the value of the equipment returned to Mr. Weisberger, as counsel for plaintiff did not deem this material to the case.

That the cost of completing the work exceeded the contract price by fifty-one thousand dollars cannot have been said to indicate that the minds did not meet as to the probable cost of this work. On the contrary, the demand of the Government of a forty-five thousand dollar bond to secure to itself the recovery

of excess cost indicates that the parties had in mind the possibility of just such an excess cost as, in fact, occurred, and, in addition to this, the Government had in mind the security of the equipment purchased by contractor, since, by Paragraph 12 of the contract, the Government attempts to maintain its first claim upon this property by demanding a covenant that the contractor will not mortgage his plant.

As to how much the changes lessened the cost of the work there is no evidence.

We respectfully submit to this Court that the facts of the case as above outlined, construed in the light most favorable to the defendant, raise only two questions of law:

First: Does mere difficulty of performance, even though unforeseen, excuse? And,

Second: Can mutual mistakes be implied from the bare fact that the cost exceeded the contract price?

Upon both propositions we believe the law well settled. Upon the question of impossibility of performance the Supreme Court of the United States has many times expressed itself.

In the case of

Dermott v. Jones, 2 Wall., 1,
the Court held that the law regards the sanctity of contracts; that it requires parties to do what they

agreed to do, and if unexpected impediments lie in the way, a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provisions for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled.

In the above case the contract was to build and complete a building. There was a latent defect in the soil of such a nature that the foundation sunk. It was held that this was not excuse to the contractor, and that no unforeseen difficulties, however great, would excuse the performance of a definite obligation.

Also, in *Jacksonville v. Hooper*, 160 U. S. 515.

Here the contract was in the nature of a lease with a covenant to procure insurance. It proved impossible to obtain the insurance. The Court held that this was no excuse.

In *Chouteau v. U. S.*, 95 U. S. 61,

the Court holds that a contractor takes the risk of the prices of the labor and materials which he is bound to furnish, and he cannot expect the other party to guarantee him against unfavorable changes in those prices.

Also, in *U. S. v. Smoot*, 15 Wall., 36,

the Court held that the impossibility which released a man from obligation to perform his contract must be real, and not a mere inconvenience.

It is contended by the defendants that the rule of law expressed in these cases has been changed, and

that the proper rule of law regarding impossibility of performance is stated in the case of

C. M. & St. P. Ry. Co. v. Hoyt, 149 U. S. 1.

To this we agree. In that case, at page 15, the Court lays down the following rule:

"There can be no question but that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damage for the non-performance, and such construction is to be put upon an involved undertaking where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor, but where the event is such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened."

It is respectfully submitted that this case does not lay down a new rule regarding the impossibility of performance, but that if the effect of this case is to impose a less burden upon an unfortunate contractor, it is due to the more lenient rule of construction rather than to a change in the rule of substantive law.

The Court simply refuses to construe an absolute undertaking from an undertaking expressed in general terms.

It is submitted that the case is peculiarly in point. The impossibility or mistake complained of

by defendants is in the matter of the specifications. Paragraph 11 of the contract provides that "bidders must satisfy themselves as to all local conditions affecting the work, and no information derived from maps, plans, specifications, profiles, or drawings, or from the engineer or his assistants, will in any way relieve the contractor from any risk or from fulfilling all the terms of his contract."

There can be no doubt that this is an absolute undertaking. The contractor knew the local conditions. He had before him at the time he submitted his bid the specifications of which he now complains, and, what is of vital importance in this case, he himself chose to bid upon this form of canal when an alternate plan, entirely eliminating the features of which he now complains, was before him, and which he could have bid upon had he so desired. (See Notice to Bidders in the original advertisement; also reference to alternate type, testimony Theodore Weisberger (235)).

The joining of these shapes was a minor detail in the specifications and work to be done. No unit price is given for this work in the contract and specifications, but it is included in the general price bid for laying the shapes.

The Court holds in the case of

Kinser Construction Co. v. State, 125 N. Y. Sup. 46,

that the impossibility of minor details will not excuse

in any event. The ultimate decision in the last named case, however, has been used by the defendants in error to support their contention. We submit, however, that it stands only as an additional authority for the proposition that the courts will not imply an absolute obligation from the undertaking expressed in general terms, and that it has no application whatever in a contract where there can be no question that the undertaking is absolute. The rule is one of construction, and not of substantive law.

Upon the second proposition, we believe the law to be that where a fact alleged to be a mistake, if it be in fact a mistake, is equally unknown to both parties, or where each has equal information or means of knowledge, or where the fact is doubtful of its own nature, in every such case if the parties have acted with entire good faith a court of equity will not interpose.

Juzin v. Toulmin, 9 Ala. 662; 44 Am. Dec. 448.

As above stated, in the notice to bidders made a part of the contract in this case, the defendant had opportunity to bid upon two distinct designs of canal construction; he chose one upon his own responsibility and at his own risk, and cannot now be heard to allege non-feasibility or mistake, under the rule of law above cited, especially where he has not alleged bad faith on the part of the plaintiff, but has admitted in his pleadings that, at the time he submitted his bid, the plan of construction was experimental to him.

Relief for mutual mistake can only be granted when it is shown that mutual mistake existed at the time of entering into the original contract. The Court in stating his opinion that he believed a mutual mistake existed, based it entirely upon the resultant excess cost. There is nothing in the evidence to show that, at the time the bid was made, an excess cost was to have been anticipated had the work been carried on diligently in accordance with the terms of the contract. The excess cost may have arisen from the inexperience of the contractor, which inexperience is admitted throughout the record; it may have arisen from the inexperience or lack of skill in those entrusted by the Government with the carrying out of this work; it may have arisen on account of an increased cost of labor supply; it may have resulted from any one of a number of contingencies arising after the time of contract. There is no evidence in the record to show that any of these contingencies may not be responsible for the excess cost, or that, had the contract been completed under conditions existing at the time of the bid, it would not have yielded a profit.

A third reason why defendant cannot be heard at this time to ask to be excused from the obligations of this contract on account of mutual mistake is that, even though the mistake existed, upon his own testimony he continued the work upon this contract for a period of over one year from the time of entering upon the contract until date of suspension,

assuming for the sake of argument that the thing complained of was a mistake. Mr. Weisberger testified that the difficulty became apparent in April, 1907, before work was really started. (R-194). Also, on his own testimony, as hereinbefore quoted, did not even at the time of suspension claim that the method of manufacturing this joint in itself was an impossible feature; yet the facts testified to upon which he now relies occurred long before the time of suspension.

One attempting to take advantage of a mistake must do so immediately, and if he is guilty of laches he cannot complain.

See cases collected in 28 L. R. A. 887.

A fourth reason why defendant cannot be at this time heard to demand excuse from the performance of his contract on the ground of mistake is that, at the time of discovery of his mistake, he did not attempt to reform his contract, but proceeded to comply with it according to its terms, and continued to do so until stopped by order of the engineer, given on account of climatic conditions, and now claims that had he not been so stopped and the contract suspended, he would himself have completed the contract according to its terms.

See cases collected Vol. 28 L. R. A. p. 891.

It is respectfully submitted, therefore, that upon the facts of this case and upon the law applicable

thereto, this Court should reverse the opinion of the lower Court, and should order judgment entered for the plaintiff, notwithstanding the verdict of the jury.

Respectfully submitted,

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IN THE
**UNITED STATES CIRCUIT COURT
 OF APPEALS**

FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
 Plaintiff in Error,

vs.

THEODORE WEISBERGER and MAUD
 WEISBERGER, his wife, and EMPIRE
 STATE SURETY COMPANY, a
 Corporation,

Defendants in Error.

No. _____

 BRIEF OF DEFENDANTS IN ERROR.

 Upon Writ of Error to the United States
 District Court for the Eastern District of Washing-
 ton, Southern Division.

 PARKER & RICHARDS,
 Attorneys for Defendants in Error.

STATEMENT.

In the year 1906, the plaintiff, under the provisions of the Act of Congress approved June 17th, 1902, through its Secretary of the Interior, authorized and directed the construction of what is known as the Tieton Reclamation Project, for the diversion of waters from the upper tributaries of the Natchez River for the purpose of irrigating lands in Yakima County, State of Washington, lying north and west of the City of North Yakima. Said Reclamation Project involved the construction of a dam at Bumping Lake to impound flood waters, the construction of a main canal about twelve miles long from a point on the Tieton River about fifteen miles above its junction with the Natchez River to a point in section ten, township fourteen, N., R. sixteen E. W. M., together with the necessary laterals and distributing ditches for conveying the water to the lands to be irrigated.

The matters in controversy in this action grew out of a contract let in connection with the construction

of this main canal, which is shown on Drawing No. 2 of Plaintiff's Exhibit 1, and the enlarged map therefrom introduced by defendants in evidence as Exhibit Q. This canal is about eleven miles in length, consisting of 49,494 feet of open canal and 7,752 feet of tunnels, nearly all of which is lined with concrete.

In laying out the work, the Government officials divided the construction of the main canal into seven parts designated as "Schedules," and provided for two forms of construction, which were designated Schedules A and B; the form of construction as decided upon and which was carried out approximately, is shown in the Schedules 1A to 7A, pages 35 to 48 inclusive of Plaintiff's Exhibit 1.

Schedule No. 1 included the building of the dam and head-works for diverting water from the Tieton River into the canal. Schedule No. 2 included the open canal excavation from the end of Division 1 to Station 200, as located on the canal; in this division there was included one tunnel known as Steeple Tunnel. Schedule No. 3 provided for the excavation of the canal from Station 200 to Station 375. In this division there are two tunnels known as Trail Creek and Log Slide tunnels. Schedule No. 4 provided for the excavation of the canal from Station

375 to Station 345. In this schedule there are four tunnels, two long ones known as Columnner and Weddle tunnels. Schedule No. 5 provided for the construction of the canal from Station 545 to Station 650. The plans as originally outlined contemplated the construction of several flumes and also there were, in Schedules 1 and 2, some sections of unlined canal. The profile of the canal is shown on Drawing No. 5-A attached to Plaintiff's Exhibit 1, which gives all of these matters in detail. On Drawings No 6A and 7A are shown the manner in which the canal and tunnels are to be excavated. The specifications as to their construction are set forth on pages 35 to 43 inclusive in said Exhibit 1.

The method of lining the canal as provided for in the Government specifications was, by what are called in the contract and throughout the testimony, "concrete shapes," to be manufactured and placed in the canal after the same had hardened. Schedules 6-A and 7-A, set forth on pages 43 to 48 both inclusive of Plaintiff's Exhibit 1, give the specifications for the construction and laying of these shapes. Drawings No. 8-A, 9-A, 10-A and 11-A give the details of their construction.

On September 19th, 1906, the Government advertised for bids for the construction of these various

divisions or schedules of this main canal. No bids were received for any portion of the work except that of defendant, Weisberger, who bid for Schedules 6-A and 7-A (Transcript pages 180 to 184). The Government never succeeded in letting any other portion of the work by contract and, after several attempts, undertook the construction of Schedules 1, 2, 3, 4 and 5 by what is commonly called "force account."

In December, defendant Weisberger was advised by the Project Engineer that the acceptance of his bid would be recommended and that he would get the contract for the work under Schedules 6-A and 7-A. The contract, which is introduced in evidence as Plaintiff's Exhibit 1, was signed by Weisberger on January 5th and by the Government on January 24th, 1907 (Transcript p. 185). Attached to this contract and made a part thereof, was a book of maps, profiles and drawings, giving the outline of the canal and the details of construction. These are the drawings above referred to.

As above stated, the Government undertook, itself, the work to be performed under Schedules 1, 2, 3, 4 and 5-A. Before defendant, Weisberger, could do any work under Schedules 6-A and 7-A, it was necessary that the Government should have com-

menced and completed, ready for the laying of shapes, such portion of the canal as it desired the shapes to be placed in at any given time. The contract further provided (Plaintiff's Exhibit 1, pages 34 and 36, Sections 34 and 47A), that the right of way for all works, ditches, etc., should be provided by the United States; **that before it should become necessary for the contractor to begin construction under the contract,** "the **United States** will build a wagon road in the Tieton Canyon to the diverting dam approximately as shown on Drawing 2, and also make suitable improvements in the existing road." In Section 96 of the contract (Plaintiff's Exhibit 1), it was provided that the work of manufacturing the concrete shapes should be executed at various points in the bottom lands of the Tieton Canyon, as shown on Drawing No. 2 and marked "Locations 1, 2, 3 and 4," these being the sites which the Government engineers had selected and designated for that purpose. Before bidding on the contract, Weisberger made a trip up the canyon and examined these sites (Transcript pages 174-177).

The road which the Government agreed to construct was never completed to the diverting dam nor to within a mile and a half thereof, nor was it completed so that Weisberger could use it to get his

machinery and appliances up to the point where the first shapes were to be manufactured, until about the 1st of July, 1907. After that, the road was subsequently blocked by the Government employees throwing out rock and debris from the canal which they were constructing above the road (Transcript Weisberger, p. 192; Dimmick, p. 256-257; Cary, p. 270). Between the time when the map, Drawing No. 2, was prepared and bids made for the work, and the time when the work commenced, there was a flood in the Tieton Canyon and the sites which the Government had designated for the manufacture of the shapes were destroyed. This greatly hampered the contractor in carrying on the work (Transcript Heney, p. 163-164; Weisberger, p. 178).

Under the provisions of the contract as originally let, the work under Schedule 6-A was to be completed on or before November 1st, 1907, and the work under Schedule 7-A on or before March 1st, 1907. The time of completion of the work was subsequently extended (See Defendant's Exhibit H, Transcript p. 65), to August 1st, 1908, for Schedule 6-A, with an additional sixty days for curing the shapes, and October 15th, 1908, for Schedule 7-A.

As soon as he was advised that his bid would be accepted and the contract awarded him, and before

the contract was signed, Weisberger commenced work in assembling his material, preparing his plant, etc. As shown by his evidence (Transcript, p. 186 et seq.), he prosecuted the work as rapidly and as diligently as circumstances would permit. The Government commenced the work of constructing the open canal, in which the shapes were to be placed, at the diverting dam at the head of Division 1. The first portion of the canal that was made ready for receiving shapes by the Government began at Station 10, as shown on the profile on Drawing No. 5-A. Weisberger had necessarily to commence the manufacture of shapes near this point and his first plant had to be established at Location No. 4, as shown on Drawing No. 2.

As provided in Schedule 6-A, the shapes were to be made of concrete, manufactured from the sand and gravel found at or near the points designated by the Government for manufacturing sites, and reinforced with steel rods running around and lengthwise of the shapes. (Ex. 1, p. 43, drawing 8A.) The first appliance necessary for commencing work would be a crusher to break the gravel into proper sizes, then concrete mixers, steel forms, engines or motors and other heavy appliances, necessary for such work. Weisberger was not able to get his ma-

chinery on the ground at the first manufacturing site until after the 1st of July owing to the failure of the Government to build the road. His evidence shows that he proceeded with due diligence in setting up his plant and manufacturing the shapes, until the work was ordered stopped by the Government engineers on November 7th (See Defendant's Exhibit N, Trans. p. 69). When a portion of the shapes were manufactured and tested it developed that the shapes were not as rigid as the Government engineers expected and developed cracks when raised, and the contractor was advised by letter from the District Engineer, dated October 22nd, 1907, (Defendant's Exhibit O, Trans. p. 72), to wait until the handling of the shapes could be considered by him and the Supervising Engineer, before the actual laying thereof should be begun. The contract provides (Plaintiff's Exhibit 1, p. 47, Sec. 120-A): "The contractor shall commence laying standard shapes in position in the trench and in tunnels not later than fifteen days after receiving written notice by the engineer to begin work." No such notice was ever given (Trans. p. 227). At the time the contractor was ordered to stop manufacturing shapes on account of the weather, he had made 3216 shapes sufficient to line 1 1-6 miles of

canal. At that time, the Government had only $1\frac{1}{4}$ miles of canal ready for lining (Transcript, p. 220).

As shown by the specifications (Plaintiff's Ex. 1, p. 42 to 48), and testimony of D. C. Heney, one of the Government engineers (Transcript pp. 149, 167 and 168), the shapes for the open canal were to be a little more than a half circle with a cross-bar across the top to strengthen them, eight feet 3 5-8 inches in diameter with walls four inches thick. The shapes for tunnel lining were to be circular rings six feet $1\frac{1}{4}$ inches in diameter. These large and unwieldy shapes were to be manufactured in the open country on the rough ground naturally constituting the bed of the Tieton River, some fifteen miles from the nearest railroad station. They were to be laid in the canal so as to practically fit together and jointed with a joint only one-eighth of an inch in width (See Transcript, p. 160, Exhibit 1, Drawings 8-A and 10-A), and the joints finished to a smooth, flush surface (Sec. 123-A, Exhibit 1). The shapes were to be constructed and laid according to the specifications and requirements of the Government engineers, and the work completed in a thorough, workmanlike manner by skilled mechanics, and in accordance with the specifications and drawings attached to the contract, and satisfactory to the engineer in charge (See contract, Ex. 1,

p. 31, Sec. 20, p. 35, Sec. 39-A). The engineer in charge at first required these shapes to be made practically perfect, allowing a variation of only 1-16 of an inch in the radius of any shape. Afterwards this was increased to 1-8 of an inch. It developed in the construction of these shapes that, owing to the thinness of the walls as compared to their size, and their consequent weakness and flexibility, it was practically impossible to construct the shapes to conform to these requirements, and lay them in the canal and join them closely, as required by the specifications (Trans., Weisberger, p. 206 to 215; Crownholm, p. 301-306-307-312-313; King, p. 329-300-371; Bunch, p. 324).

This method of lining a canal was new and untried (Transcript, Heney, p. 166; Crownholm, p. 311; Doolittle, p. 285). No canal of this size had been lined in this manner and the whole scheme was practically experimental. A great deal of time was necessarily consumed by the Government engineers and Weisberger and his men in experimenting and endeavoring to devise the necessary appliances for making these large, heavy shapes, under the conditions attendant upon their manufacture, in such manner that they would conform to the requirements, and result in a canal with a smooth interior.

surface, which would not have shoulders projecting for the formation of eddies, thus retarding the flow of water therein, and which would have the hydraulic functions specified on drawing 10A, Exhibit 1.

By the time the Government had any portion of the canal ready for lining, Weisberger had manufactured over 3000 shapes. When he began to place them in the canal he discovered the difficulties attendant thereon and that it was impossible to join the shapes as required by the specifications. He immediately made application for a change in the manner of constructing and jointing the shapes (Transcript, Heney, p. 152; Weisberger, p. 215-216). Weisberger first made his application to the local engineer and also sent a letter to the office of the Project Engineer. He then took the matter up with the Assistant Engineer and finally with the Chief Engineer of the Reclamation Service. No action was taken on this application for change and it was still pending and unacted upon when the Government suspended the contract (Transcript p. 216).

Section 27 of the Contract (Ex. 1) provides: "Changes at contractor's request.—Should the contractor by reason of conditions developing during the progress of the work find it impracticable to comply strictly with the specifications, and apply in

writing for a modification of structural requirements or methods of work, such change may be authorized by the Engineer, provided it be not detrimental to the work and be without additional cost to the United States."

After the work had been shut down in the Fall by the order of the Government engineers as above stated, while the application for change in the manner of construction and laying of the shapes was pending, while the extension of the contract was still in force and had nearly a year more to run, and the Government officials had lulled Weisberger into the belief that no suspension of the contract would be recommended and acting thereon he had expended large sums preparing for next season's work, when winter was on and it was impossible, owing to the depth of snow in the Tieton Canyon and the weather, to do anything under this contract, the engineers in charge recommended the suspension of the contract, and thereupon, Morris Bien, the Acting Director of the Reclamation Service, recommended to the Secretary of the Interior that the contract be suspended and that the Government take over the work, together with the machinery, tools, appliances, etc., which the contractor had on the work (Plaintiff's Exhibit 3). This recommendation was approved by

the Secretary of the Interior February 1st, 1908, while Mr. Weisberger was in the East endeavoring to get an interview with the Secretary of the Interior, and the equipment of the contractor taken possession of by the Government employees.

The Government thereupon took over the work and completed it, itself; finishing on October 15th, 1909, or about two years after the date on which the work was to be completed under the original contract (Transcript, Weisberger, p. 219; Crownholm, p. 311). In completing the work, the Government departed very materially from the plans and specifications outlined in the contract and which the government engineers were compelling Contractor Weisberger to comply with (Transcript, Davis, p. 128-130-131; Heney, p. 160-161; Crownholm, p. 304; King, p. 329-372; Stipulation as to Changes, Transcript 341).

As shown by the testimony referred to, when the Government undertook the work, it found, as had Weisberger, that it was impossible to make these shapes true to radius within 1-16 or 1-8 of an inch, and a variation of two or three times that amount was allowed. The form of the cross-bar was also changed to give more strength to the shapes. Instead of requiring the shapes to be brought prac-

tically together and jointed with a joint only 1-8 of an inch in width, the Government allowed whatever width of joint might be found necessary or practicable to make a smooth surface, the width of the joints ranging from $1\frac{1}{2}$ to 6 inches. This made it practicable to so place the shapes that the line of the canal could be followed, and the projections arising in the interior, from the shapes not coming together evenly, could be overcome by beveling these joints. Many other changes were also made, as is shown by the stipulation as to changes which was agreed upon at the trial, among which was the changing of Log Slide Tunnel, 1000 feet in length, to open cut, increasing length to 2394 feet, Weddle tunnel 445 feet in length changed to open cut, tunnels at stations 515 and 530 changed to open cut, elimination of the flumes and the lining of one of the largest tunnels with monolithic lining instead of shapes; Trail Creek tunnel as changed being 3120 feet long.

The Government claimed that it cost to complete the work, \$51,095.05 in excess of the price therefor which was to be paid Weisberger under the contract; for the recovery of which amount this action was brought against the defendant, Weisberger, and his surety, Empire State Surety Company.

Defendants denied that the contract was rightfully suspended or that any money whatever was due the Government and set up six affirmative defenses, the fourth, **fifth** and sixth of which were counter-claims against the Government for the taking of Weisberger's equipment, the rental of his warehouse and moneys due him under the contract. The other defenses were: First, that the Government having charged this money against the Tieton Water Users' Association, was not the real party in interest and could not recover herein. No proof was allowed under this defense by the Trial Court. The second affirmative defense alleged failure on the part of the United States to perform the contract on its part, the wrongful stopping of the work by the Government, and the taking of the contractor's equipment; that the act of the Secretary of the Interior in suspending the contract was taken under such a gross misapprehension and mistake regarding the facts that he failed to exercise an honest and unbiased judgment in the premises. The third affirmative defense sets up that there was a mutual mistake in the making of the contract; that it was impossible and impracticable for the defendant to perform the contract in accordance with its terms and conditions, (Transcript, p. 13 to 30).

The case was tried to a jury, who returned a verdict in favor of the defendant, on which judgment was entered.

ARGUMENT

The plaintiff in error assigns five errors which it claims the District Court committed in the trial of this cause. In their brief, counsel for plaintiff in error do not separately discuss these various assignments; but practically base their entire argument upon the question of the sufficiency of the evidence to sustain the verdict.

A large amount of evidence was submitted to the jury which raised several questions for their consideration, the more important being:

1. Did the Government perform the contract on its part so as to put it in a position where it could rightfully insist upon strict performance by the defendant, Weisberger?
2. Was the contract rightfully suspended?
3. Was the contract possible of performance?
4. Was there a mutual mistake of the parties in making the contract for lining the canal in the manner specified?

5. Did the Government perform the same work, after it suspended the contract, that Weisberger had agreed to perform?

But two of these questions were submitted by the Court to the jury (Trans. 392); the second and third, the third practically includes the fourth.

We will discuss the several assignments of error in their order.

The first assignment of error is unintelligible. No such motion as that mentioned in the assignment was ever made.

The second error assigned is a denial of plaintiff's motion for a directed verdict, made at the conclusion of all the testimony as follows: (Transcript, p. 384)

"Now, if the Court please, at this time the Government desires to make a motion for a directed verdict on the ground there is nothing in the evidence produced by the defendant which shows that the suspension of this contract was broad enough or that it was effected by anything that was untrue."

This motion only goes to the evidence regarding the suspension of the contract, it is not made a ground of the motion that there is no evidence to go to the jury on the other questions regarding which evidence had been received. Clearly, the Court could

not ignore all of the other evidence and order a directed verdict based on this motion as the case stood at the time it was made. If, as stated in the motion, there was not sufficient evidence to show that the suspension of the contract was wrongful (which of course we do not admit), there was evidence sufficient to sustain defendants' contention as to the other points which were in issue. After this motion was denied, the plaintiff in error went on with the trial and offered other evidence. In so doing it waived any error in the denial of the motion for an instructed verdict.

Adams vs. Pedermann Mfg. Co., 47 Wash., 484.

The third assignment of error is that the verdict is contrary to the evidence and against the law. If the plaintiff in error had desired to raised this question, it should have made a motion for new trial. Having failed to move for a new trial, under all the decisions and rules of practice, it waived its right to assert or contend that the verdict of the jury was contrary to the weight of the evidence or not warranted by the law of the case as given to the jury by the Court.

As the record stands the fourth and fifth assignments of error together present but one question for consideration, viz: Did the Trial Court err in

refusing to enter judgment for plaintiff in error, notwithstanding the jury had found for defendants in error. The whole argument of plaintiff in error is practically directed to this one proposition.

MOTION FOR JUDGMENT NON OBSTANTI VERDICTO

The Trial Court properly over-ruled the motion. In fact, the motion should not have been considered, because it was not made in time, and under the form of the motion itself the Court could not properly consider the sufficiency of the testimony to sustain the verdict, but could only look to the record in the case.

The verdict was returned on February 23, 1912, the motion for judgment non obstandi veredicto was served and filed on the 29th of February, 1912. There is no statute of the United States and no statute of the State of Washington expressly defining this motion. The general rule in the states where such motion is allowable, is that it must be made immediately upon the coming in of the verdict or at least within the time allowed by the statutes of the state for filing a motion for a new trial. The Trial Court held that the motion was filed in time because within the limit of time for

filing a motion for new trial under the rules of the U. S. Circuit Court. We think the statute of the state should govern rather than the rule of the United States Court, as at the time the rule was made, the motion for judgment *non obstanti veredicto* was not recognized by the Courts of the United States as existing in the State of Washington. The right to make such motion was never clearly settled and defined until the decision in the case of *Rowe vs. Standard Furniture Company*, decided by the Supreme Court of Washington February 2nd, 1906. The statute of the State of Washington on the subject of new trials is found in *Remington & Ballinger's Codes and Statutes of Washington*, Section 402:

“The party moving for a new trial must, within two days after the verdict of a jury, if the action was tried by a jury or two days after notice in writing of the decision of the Court of Referee, if the action was tried without a jury, file with the Clerk and serve upon the adverse party his motion for a new trial designating the ground upon which it would be made.”

The motion as made (Transcript, p 50-51), is as follows:

“Comes now the above named plaintiff, United States of America, by Oscar Cain, Esq., United States Attorney for the Eastern District of Washington, and Ralph B. Williamson, Special Assistant to the United States Attorney for said District, and

respectively moves the Court for judgment according to the prayer of its complaint, notwithstanding the verdict of the jury in said cause.

“This motion is based upon the records in said case.”

This is the old form of the motion under the common law practice and rule that such a motion goes only to the sufficiency of the record to sustain the verdict and can be granted only where it appears from the pleadings in the case, without consideration of the evidence, that the plaintiff is not entitled to the relief prayed for. It is an elementary principle that the evidence is no part of the record. Counsel for plaintiff in error did not make their motion on the ground that the evidence was not sufficient to sustain the verdict. This being so the court could not properly consider the evidence in passing on the motion but should have only looked to the record. Objection to the hearing of the motion on the above grounds was made at the time it came on for argument and was over-ruled by the Lower Court. (Transcrip, p. 56.)

Regardless of the foregoing reasons for over-ruling the motion, it could not be granted in any event. It is a well established rule in this Court, in the United States Supreme Court and in the Supreme

Court of the State of Washington, that a judgment *non obstanti veredicto* will not be granted where there is any evidence to sustain the verdict. It will not be granted because the verdict is contrary to the weight of the evidence or because it may be uncertain, unconvincing or conflicting.

United States vs. Gardner, (C. C. A. 9 Circ.); 133 Fed., 285;

Perkins vs. N. P. Ry., (C. C. A. 9 Circ.); 199 Fed., 712;

S. C. & P. R. Co. vs. Stout, 17 Wallace, 657, 664;

Roe vs. Standard Furniture Co., 41 Wash., 546, 550;

Weir vs. Seattle Elevator Co., 41 Wash., 657, 661;

Adams vs. Pedermann, 47 Wash., 485, 486;

Messir vs. McClain, 51 Wash., 140;

O'Conner vs. Forth, 58 Wash., 216;

23 Cyc., 779.

In the case of the United States vs. Gardner *supra*, this Court said:

“At common law, a judgment *non obstanti veredicto* could only be granted upon the application of the plaintiff and upon a plea to the declaration which confessed the cause of action and set up mat-

were sufficient to constitute a defense or a bar. The rule

ters in avoidance, which, upon their face, has been relaxed in most of the states so far as to permit a judgment on the pleadings notwithstanding the verdict in behalf of either the plaintiff or the defendant. We find no statute of Washington or decision of the Supreme Court of that State further relaxing the rule so as to permit the consideration of the evidence in the case."

Subsequent to the date of the above decision, which was in 1904, the Supreme Court of Washington, in the case of *Roe vs. Standard Furniture Company*, supra, established the rule that a motion by the defendant for judgment *non obstanti veredicto* should be granted where it appears that the plaintiff has no possible right to recover. We know of no decision in the State of Washington which has established the rule that such motion should be granted in favor of the plaintiff because of insufficiency of the evidence of defendant.

In all of the cases decided by the Supreme Court of the State of Washington, it has been held that the power of the Court to grant a motion for judgment is practically commensurate with its power to direct a non-suit; if there is any evidence sufficient to warrant submitting the case to the jury at all, the only remedy of the party who feels himself aggrieved by the verdict is to move for a new trial. If the trial court considers that the verdict is con-

trary to the evidence, or that the evidence preponderates in favor of the party against whom the verdict is given, then it should set aside the verdict and submit the case to a second jury; but it has no right to take the burden of deciding the facts upon itself.

In the case at bar, at the close of defendants' testimony, counsel for plaintiff moved to strike the evidence concerning the suspension of the contract. (Trans. p. 380.)

After all the evidence was in and both sides had rested, the plaintiff moved for a directed verdict in its favor. (Trans. 3. 384.)

Both motions were over-ruled and the case was submitted to the jury. After the return of the verdict in favor of defendant in error, plaintiff in error moved for judgment notwithstanding the verdict, which was denied. (Trans. p. 51.)

The case falls squarely within the decision in **Perkins vs. N. P. Ry. Co.**, *supra*, decided by this Court last October. In that case, there was a motion at the close of plaintiff's testimony to take the case from the jury and dismiss it. At the close of defendant's evidence, a motion was made to direct a verdict in favor of the defendant. After the verdict was returned, a motion was made for judgment *non obstan-*

ti veredicto, which was granted. The judgment so entered was reversed.

In the opinion written by Judge Rosse, this Court says:

“As will be readily seen the Court below * * * * reached that conclusion by contrasting and weighing the evidence on behalf of the respective parties. In passing upon the motion which gave rise to the judgment complained of, the Court below had no right to weigh the evidence that had been given in the case and determine on which side it preponderated: on the contrary, it was bound to take the most favorable view for the plaintiff of the evidence on her behalf, and of all inferences that could be reasonably drawn therefrom by reasonable men, to the exclusion of the evidence on behalf of defendant,” citing a number of cases.

Further on the opinion quotes with approval from the opinion of the Supreme Court of the United States in *S. C. & P. R. vs. Stout*, as follows:

“Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have, themselves, seen and heard, the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safe conclusions from admitted facts thus occurring than can a

single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given or whether they established negligence."

If that was the correct rule to apply in those cases, it should certainly control the case at bar. Here the defendant introduced several witnesses whose testimony covering two or three hundred printed pages, is amply sufficient to sustain the verdict; which testimony the plaintiff in no way attempted to refute or contradict. Surely the Trial Court was right in refusing to interfere with the verdict returned herein. If plaintiff in error was not satisfied with the verdict it should have filed a motion for new trial. In the light of the evidence that was the only manner in which the correctness of the verdict could be tested. No such motion was made, nor was any motion made prior to the submission of the case to the jury, which was sufficient to warrant the Court in taking the case from the jury. The case having been submitted to the jury and there being evidence to sustain their verdict, the plaintiff in error having made no effort to test the correctness of the verdict by a motion for a new trial cannot now be heard to say that the verdict was not according to the law and evidence or

that the judgment entered pursuant to said verdict should not have been entered.

There was unquestionably competent testimony tending to establish the defenses of the defendant which was submitted to the jury. Whether this testimony was credible, presented questions of fact for the consideration of the jury and their verdict is binding upon the Court.

Erickson vs. McNeely & Co., 41 Wash., 509.

Rector vs. Bryant Lumber Co., 41 Wash., 556.

Veseberg vs. Michigan Lumber Co., 45 Wash., 670.

Campbell vs. Wheelihan Co., 45 Wash., 675.

Meser vs. McClain, 51 Wash., 675.

O'Conner vs. Force, 58 Wash., 215.

In the last case above cited, the Supreme Court of Washington, speaking through Judge Fullerton, says:

“We are still satisfied also that the appellants by their evidence made a prima facie case. This being so, the Trial Judge should not have denied them the right of trial by a jury on mere contradictory evidence, no matter what his own conclusions may have been as to weight of the evidence. If in his belief the evidence against the plaintiffs was so favorable, or overwhelming as to cause him to feel that the verdict of the jury amounted to a miscarriage of justice,

it was his province to set the verdict aside and submit the question to a second jury, but he had no right to take the burden of deciding the facts upon himself. The right of trial by jury is a constitutional right and is not to be denied the litigant who insists upon it and complies with the statutes relating thereto. In this instance, since no new trial is asked for, it is the duty of the Court to enter judgment in favor of the plaintiff on the verdicts."

At the trial of the case below, the Court withdrew from the consideration of the jury all but two questions; one—was the contract possible of performance at the time it was entered into; the other—was the Secretary of the Interior guilty of fraud in suspending the contract, or did he commit such a gross mistake that fraud on his part would be implied? (Transcript, p. 392.)

IMPOSSIBILITY OF PERFORMANCE OF CONTRACT

The first proposition which the Court submitted to the jury was whether or not the contract was possible of performance. Surely there was sufficient evidence on which the jury could decide this question in favor of the defendants.

The testimony of Mr. Heney, Mr. Weisberger, Mr. Doolittle and Mr. Crownholm, (Transcript, p. p. 166, 285, 311), shows that the method of lining the canal

was untried and that the form of construction adopted was an experiment on the part of the Government engineers. The testimony of Mr. Weisberger further shows (Transcript pages 207, et seq) that he spent two or three months trying to devise appliances by which he could make the concrete shapes so as to fulfill the requirements of the Government engineers; that after all of this experimenting and work was done, it was found impossible to construct these unwieldly shapes, with walls only four inches thick, so that they would be true to radius within the requirements of the Government engineers, and when it came to laying them in the canal it was impossible to joint them in accordance with the specifications so as to form a canal lining which would fulfill the requirements of the contract, or which would follow the line of the canal.

Mr. Crownholm, who is an engineer, and at the time of the trial was in the employ of the Government, and would naturally make his testimony as favorable as possible to the plaintiff, testified as follows: (Trans, p. 301.)

Q. Was it possible to make those shapes and place them $\frac{1}{8}$ of an inch together and make a smooth joint or make an eighth inch joint?

A. No.

(Page 306.)

Q. But the practical result of trying to cast these shapes and joining them to an eighth of an inch, was that they would come together at some places and not at others, was it not?

A. Well, this bottom here would be up or down here (illustrating); it was necessary to move the shapes in this direction, or this way probably.

Q. And that would throw it out somewhere else?

A. It meant it would be in contact at one point and probably out an inch somewhere else.

Q. So it was practically impossible to make them touch all around to an eighth of an inch?

A. It was unless we would have went back to the manufacturing and require a more exact diameter than what was being made.

(At Page 312, on cross-examination by plaintiff's counsel he testified:)

Q. Will you explain your statement regarding the possibility of joining the shapes as originally designed?

A. Why, in that I meant, of course, that it would be prohibitive cost from my point of view to line it with the eighth of an inch joint; that it was on account of economy that this other joint was adopted and on account of its being more substantial—more practicable.

(Page 313.)

Q. Well, but the irregularities that existed; you said it was apparently impossible for you to put those two shapes together without leaving a little ridge—that is, you could not make an absolute smooth space; was not the chief difficulty, the difficulty that you encountered, the laying or placing of those shapes in the canal rather than defective manufacture of the shapes?

A. I could not follow any prescribed lines unless the shapes were exact in length. Unless each seg-

ment was exactly 2 feet I could not follow any prescribed lines, because it would throw me off that line, don't you see? If I tried to keep an eighth of an inch joint all around.

(Chas. Bunce testified, Page 324.)

Q. But with your experience, all your experience in making those shapes there, were you able to get the radius and diameter within a sixteenth of an inch?

A. Well, you could get it, but you could not keep it there. If you would get it and set it, the next time you took it out it would vary—the spring and tension—the tension in the steel.

Q. Then it was practically impossible to keep it within a sixteenth of an inch?

A. And accomplish anything, yes.

(Herbert J. King, a disinterested witness, testified, page 325.)

Q. Did you encounter any difficulty in laying these shapes?

A. Well, in laying them to the satisfaction of the inspectors. We found it very nearly impossible.

Q. Was that more or less difficult to set the shapes as manufactured by Mr. Weisberger and set in the fall of 1907, than to set the shapes manufactured by the Government and which you assisted to set in 1909?

A. It was infinitely more difficult.

Q. In what did the difference in difficulty consist?

A. Well, it was found that the length of the sections was irregular, and if they were butted up together as required by the specifications to the one-eighth inch limit, that they would throw themselves out of line; in other words, they could not be kept in line and to the joint, as required, at the same time.

Q. How was that overcome, if at all, in the other joints used by the Government?

A. Why, the joints were widened so that they could be kept in line irrespective of the distance between the shapes.

Q. Now, in setting these shapes and attempting to join them with a sixteenth of an inch in radius, would or would not there be a ridge left inside the shape?

A. Well, there was, yes.

Q. And what was the result of that? What did the Government subsequently adopt to avoid that abrasion in the shapes?

A. Well, the off-set, as you might call it, was still present, but the width of the joint allowed the off-set to be tapered off, if I may express it that way; in other words, there was not the sharp projection that would be present in the other shapes.

Q. Now from the experience that you had there, Mr. King, what would you say as to whether or not it was possible or impossible to line that canal with shapes constructed as defendants' Exhibit "B," with the variation of one-sixteenth and one-eighth of an inch?

A. I should say it would be practically impossible.

(On cross-examination, page 330, by Mr. Williamson.)

Q. When you say "practically impossible," do you mean impossible or more difficult?

A. I thing "practically impossible" would cover it.

Q. You mean then that it was not practicable?

A. I mean even more than that.

Q. Not impossible? What do you mean?

A. Why I mean economically impossible.

(Mr. King being re-called testified, page 371.)

Q. Now Mr. King, in addition to what you said yesterday, when you came to lay these shapes in this canal and fit them to an eighth of an inch joint, what was the result as to being able to follow the line or grade of the canal?

A. Why we found that it was impossible to follow the line of the canal, and also impossible to follow the grade.

Q. You then found it impossible to lay those shapes in that way so as to make a proper lining for the canal?

A. In accordance with the inspection.

Q. And specifications?

A. And specifications.

Q. When you were laying for the Government what width did they make these joints?

A. Personally, I laid none. The joints were—

Q. You knew about them?

A. Yes sir, I jointed them. The joints ranged from on a tangent, from an inch and a quarter to an inch and three-quarters in width and on curves, on the outer side of the curve they ranged as high as 6 inches in places.

Defendants started to offer further proof on the subject of impossibility by another Government engineer, Guy Finley, but desisted on the suggestion of the Court that the subject had been sufficiently covered. (Transcript, pp 374-5.)

The Government offered no testimony in rebuttal to refute this testimony, though it had its chief engineer and a number of its assistant engineers present. As was said by the Supreme Court of the State of Washington, in *Donaldson vs. Abraham*, cited below:

“There was no contrary evidence introduced or offered, and the record contains nothing otherwise that tends to impeach the witness. We can see no reason therefore why we should not give his evidence the credit it seems on its face to deserve, and hold

that the bid was submitted through inadvertance and mistake."

In the case at bar, no attempt was made to impeach the testimony of any of these witnesses, nor to contradict it. The witness, Mr. Crownholm, is an engineer now in the employ of the plaintiff in error. We think that the jury were fully justified in accepting the testimony of the witnesses as true and in finding that the contract was impossible of performance in accordance with the specifications and the requirements of the Government engineers and inspectors. With this evidence before them, unimpachd and uncontradictd, we do not see how they could have found otherwise.

Evidence having been introduced that the contract was impossible of performance, and the jury having so found, Weisberger could not be held to the strict letter of the contract, the law will excuse him from its performance, and such excuse is sufficient to bar any recovery in this action by the Government.

C. M. & St. P Ry vs Hoyt, 149 U. S., 1, 15.

Moffit vs. Rochester, 178 U. S., 374.

Kinzer Construction Co. vs. State, 125, N. Y. S., 46.

Donaldson vs. Abraham, 68 Wash., 208.

In the case of the C. M. & St. P. Ry. vs. Hoyt,

above cited, the Supreme Court of the United States, speaking through Mr. Justice Jackson, says:

“There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance and such construction, is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened.”

The cases cited by plaintiff in error on this point are all old cases. The tendency of the modern decisions is to depart from the harshness of the rule adopted in some of the earlier cases to the effect that a party will be held to the strict letter of his contract in any event.

The case of *Kinzer Construction Co. vs. State*, above cited, decided by the Court of Claims of New York, gives a very exhaustive discussion of this subject, cites a large number of cases, and lays down the rule as now applied by the courts. Judge Rodenbeck, in the opinion says:

“From these cases, it will be seen that a fourth ex-

ception must be made to the general rule that accident or contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law; second, where the specific thing which is essential to the performance of the contract is destroyed; third, where by sickness or death personal services become impossible; and fourth, where conditions essential to performance do not exist. (Citing a number of cases to support each of the several propositions.) From these considerations, the rule may be deduced fairly in the present case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear, which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under contract, the law will read into the contract an implied condition when it was made that such contingency will terminate the entire contract. * * *

“It would not have been fair of the state to insist upon the literal performance of its contract, and place the loss upon the claimant for the failure to perform, nor would it have been just for the claimant to insist that the state must carry out its contract as planned, or suffer the penalty of paying damages, including prospective profits for the breach of the contract. It is better to regard the contract as at an end and treat both parties as having been excused from further performance, allowing the claimant to recover for work done and for benefits received by the state under the contract down to the time of the discovery of the conditions which rendered performance impossible, and for such damages as may have resulted to it from the stop order issued by the state.”

The method of lining the canal was devised by the Government engineers; they prepared the plans and specifications; Weisberger was justified in relying on the presumption that they knew what they were doing and that the shapes could be made and the canal lined as specified. It is apparent that both parties entered into this contract laboring under a mistaken belief that this could be done. The mistake and impossibility of performance did not become apparent until a large number of shapes had been manufactured and an attempt was made to line the canal with them. As it turned out the contract "is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." It was an unequitable and unconscientious bargain and such as even in a Court of law will not be enforced according to its letter, but only so far as is equitable.

Hume vs. U. S., 132 U. S., 406.

If, by mutual mistake, a contract is founded upon a condition impossible of performance, there is no meeting of the minds of the parties in reality, and no condition can be enforced by either.

U. S. vs. Charles, 74 Fed. R., 142.

Nordick Marmon Co. vs. Kehlor, 155 Mo., 643; 56 S. W., 287.

Southern Iron Co. vs. Laclede Power Co., 109 Mo. App., 353, 84 S. W., 353.

King vs. Duluth, etc., R. C., 61 Minn., 483; 63 N. W. 1105.

Michand vs. MacGregor, 61 Minn., 198; 63 N. W., 479.

Meech vs. Buffalo, 29 N. Y., 198.

Cook vs. Murphy, 70 Ill., 96.

Fink vs. Smith, 170 Pa. St., 124; 32 Atl., 566.

Harrell vs. De Normandie, 26 Texas, 120.

Ketchum vs. Catlin, 21 Vt., 191.

Page on Contracts, Sec. 71 (and note);
9 Cyc., 353 (D).

The Government having prepared the plans and specifications, the contractor cannot be held responsible for defects therein.

Southerland on Damages, Sec. 701.

Counsel for plaintiff in error attempt to minimize the difficulties of performing the contract as originally made, and make light of the effect of the irregularities in the lining of the canal. On drawing 10-A is a schedule, headed "Hydraulic Functions,"

of the requirements of the construction as affecting the carrying capacity of the canal. In this table the requirement for the lined canal is stated $N = .012$. Interpreted this means that "the roughness of the interior of the canal is expected to be no greater than if lined with straight, unplained timber or equal in smoothness to ordinary iron pipe."

See Trautwine's Engineer's Pocket Book, 1907 Edition, p. 565.

Surely a lining with shoulders projecting an inch or more on the interior surface would not fulfill this requirement. Such irregularities figured out for the entire canal would reduce the velocity of the water as required by said schedule of Hydraulic Functions from 9.05 as given for lined canal to 6.336; reducing the carrying capacity of the canal very materially and making the lining unacceptable under the contract.

Much stress is laid by counsel for plaintiff in error upon a single question and Weisberger's answer thereto, as though such answer should overcome all the other testimony in the case and be taken as conclusive proof that the contract was possible of performance. The question was asked by the writer and he is free to admit that in view of the issues which were being tried, it was inartistically framed

and inadvertently put in the form in which it appears in the record (Trans. p. 339). Apparently, from the context, the questioner had in mind Weisberger's ability to go on with the contract with the equipment and means at his command. The question should have been put in different form or qualified by proper reference to the status of the work and the application for changes which was pending. As we all know, many of the questions asked in the heat of trial do not read as we would like them to when they appear in the record. It would be very unfortunate if the shortcomings of his attorney were to be visited upon the defendant to the extent of holding that this one question nullifies and sets at naught all that Mr. Weisberger himself and his witness said regarding the impossibility of the performance of the contract. We have no fear of such a ruling by this Court.

Counsel say that the impossibility was not a hidden impossibility. The evidence all shows that it was not discovered until the contractor commenced laying shapes in October after several thousand had been made.

Counsel say that no complaint was made regarding the road until the trial. This statement is contradicted by the record. Weisberger testified that

he protested about the road every few days (Trans. 229).

Counsel in attempting to analyze the testimony regarding the difficulties in manufacturing and joining the shapes have gotten somewhat mixed. No change was ever allowed in the manner of joining the shapes prior to suspension of the contract. The only change made was an allowance of an additional one-sixteenth of an inch for variation in the radius of the shapes manufactured under Schedule 6A, making one-eighth in all instead of one-half, as stated in Plaintiff's brief (Trans. 206). They state that a change in the width of the joint had been made before the contractor began laying the shapes. They are in error in this. The testimony on which they base the assertion says nothing about joints and nowhere in the record is there any testimony to substantiate their statement. Weisberger's application for change involved no departure from the plan of lining the canal except as it affected the joints (Trans. p. 236). True, he did not ask to be allowed to make wider joints, as was done by the Government when it did the work. But if the Government engineers did not approve his suggestion of a monolithic lining they could easily have made a suggestion of their own instead of refusing to consider the application at all.

SUSPENSION OF CONTRACT.

The provision of the contract as to suspension is found in Sec. 22, p. 32, of Plaintiffs' Exhibit 1:

"Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or if at any time the contractor is not properly carrying out the provisions of his contract, in their true intent and meaning, notice thereof in writing will be served upon him, and should he neglect or refuse to provide means for a satisfactory compliance with the contract, within the time specified in such notice, the Secretary of the Interior in any such case, shall have the power to suspend the operation of the contract."

The evidence shows that Weisberger commenced to perform the contract even before it was executed; that he prosecuted the work with due diligence and with all the means at his command. The first delay that occurred and the first default in the performance of the contract was on the part of the Government in failing to construct the wagon road to the diverting dam and to keep it open. The contract provided that this road would be constructed by the Government before the contractor should be required to commence work (Plaintiff's Exhibit 1, p. 36, Sec. 47-A). The evidence shows, Transcript pp. 192, 256-257, 270)

that the Government did not get this road constructed, so that Weisberger could get his machinery up to the first manufacturing site, until about the first of July, 1907, never completed it to the diverting dam, and frequently obstructed it so that it could not be used. As soon as he could get the machinery and plant installed, Weisberger commenced the manufacture of shapes. On August 30th, 1907, the engineer in charge, Joseph Jacobs (See Defendant's Exhibit M, Transcript p. 66), wrote to Weisberger expressing himself as satisfied with the progress of the work and stating that he would make no recommendation looking to the immediate suspension of the work. At this time there had only been sixty days during which Weisberger could manufacture shapes or would have been compelled to work at all if he had waited for the Government to comply with its agreement to build the road as provided in paragraph 47-A. Furthermore, it was the Government's duty to prepare the canal ready for the shapes, and as is shown by the testimony (Transcript p. 220), when the work shut down in the Fall, Weisberger had shapes enough manufactured to lay practically all of the canal which the Government had ready for lining.

On October 28th, the Acting Director advised Mr.

Weisberger that his contract had been extended to August 1st, 1908, for Schedule 6-A, with sixty days additional for curing shapes, and to October 15th, 1908, for Schedule 7-A (Defendants' Exhibit H, p. 65 of Transcript).

On November 4th, 1907, the engineer in charge notified Weisberger to discontinue the manufacture of concrete shapes at noon of November 5th, 1907 (Defendants' Exhibit N, Transcript, p. 69). The contract provides (Plaintiff's Exhibit 1, 120-A, p. 47) that the contractor shall commence laying standard shapes in position in the trench and in the tunnels not later than fifteen days after receiving written notice by the engineer to begin work, and he shall continuously prosecute the work until the portion which he has commenced shall be completed. No notice of this kind was ever served upon the contractor (Transcript, p. 204). On the contrary, on October 22nd, the District Engineer wrote Weisberger requesting him to delay the actual laying of the shapes until a conference could be had with the Supervising Engineer regarding the development of cracks therein (Defendants' Exhibit O, Transcript, p. 72). No other notice on this subject was ever given.

This was the condition of the contract at the close

of the season of 1907. Shortly after Weisberger shut down the work, a heavy snow-fall occurred in the canyon, and that, coupled with cold, freezing weather, made it impracticable and impossible to continue work under the contract. This condition of affairs continued until early in May, 1908. Notwithstanding the facts above set forth, on January 2nd, 1908, Charles H. Swigart, the Project Engineer, wrote a letter to defendant, Weisberger, as follows Transcript, p. 64):

“North Yakima, Washington,
January 2nd, 1908.

Mr. Theodore Weisberger,
North Yakima,
Washington.

Dear Sir:

Referring to my letter of November 26th, 1907, and certain instructions dated December 27th, relating to the prosecution of your work upon Schedules 6-A and 7-A, your contract dated January 5th, 1907, for the construction of the Tieton Main Canal, Tieton Project, Washington, I hereby notify you that the work therein mentioned and ordered has not been done or begun, and that the work of delivery of materials provided for in said contract is not being prosecuted in such manner as to insure a full compliance therewith within the time limit or at all and in accordance with paragraph 22 of the specifications, I hereby instruct you as follows:

1. That on or before January 8th, 1908, you begin the work of making such molds as will insure full compliance with your contract.

2. That on or before January 8th, 1908, you begin

the delivery of cement in accordance with instructions hereinabove referred to.

3. That you make such financial arrangements in accordance with paragraph 37 of said specifications, as will satisfy the Engineer of your ability to properly carry out the provisions of the contract within their true intent and meaning, and that you furnish evidence of same to this office on or before January 8th, 1908.

Respectfully,
(Signed) CHARLES H. SWIGART,
Project Engineer.

The Court will bear in mind that this letter was written in the midst of winter, after the work had been shut down and months before it was possible to resume work in the Spring. At the time this letter was written the Government had obstructed the road so that it would have been impossible for Weisberger to comply with the engineer's demand (Transcript, p. 217). As to requirement No. 1, the testimony shows (Transcript, p. 218-219) that Weisberger had on hand 234 molds, and would need only about 100 more to prosecute the work, which could be made in 40 or 50 days; that it would only take about ten days to deliver the amount of cement which Swigart had theretofore directed the contractor to deliver. The third requirement was absolutely outside of the province of the engineer, or anyone else to make. There is no provision in para-

graph 37, or anywhere else, that the contractor shall make any showing of financial ability, except before the contract is let. The evidence shows (Transcript p. 351-357, 369) that Weisberger had never defaulted in any payments for labor or material, had ample credit to enable him to go on with the work and there had never been any cessation or delay in the work for lack of money with which to prosecute it.

Under the provisions of Sec. 22 of the contract, it is provided that if the contractor has failed to prosecute the work so as to insure a full compliance within the time limit, or is not properly carrying out the provisions of the contract, notice thereof will be served upon him; and should he neglect or refuse to provide means for satisfactory compliance, then the contract may be suspended. The letter from Mr. Swigart above set forth is absolutely the only notice that was ever served upon the defendant, Weisberger, under the provisions of this section, and the giving of a proper notice in conformity with this provision is a pre-requisite to the right of the Secretary of the Interior to suspend the contract. We submit that the letter above referred to was not such a compliance with the provisions of this section as to furnish a proper basis, or any basis at all, for the action of the Secretary of the Interior in suspending the

contract; that the attempt to give such notice at the time and under the circumstances, showed bad faith on the part of the Government engineers.

In fact we think but one conclusion can be arrived at from reading the testimony in the case, and that is that the reclamation officials and engineers in charge of this work had found that they had adopted an infeasible plan of lining the canal, that this fact was bound to come out in Weisberger's application for changes, which he was trying to get before the head officials and Secretary of the Interior, and that they could best protect themselves by suspending Weisberger's contract and taking over the work themselves. Jacobs began talking about suspension in August before Weisberger had barely had time to get under way. It must be borne in mind that Weisberger was not bound to begin work until the Government had completed the wagon road. This was not done until July 1st, which would give Weisberger only four months under the terms of the contract to complete the whole of Schedule 6A. This was an absolute physical impossibility, and recognizing this fact the contract had been extended. In making his recommendation for extension (Defendants' Ex. X, Trans. p. 77) Jacobs gives as reasons why the contract should be extended, the failure of the Govern-

ment to complete the road, inability of the Government to perform the work on Schedules 2A, 3A, 4A and 5A within the time specified and that Weisberger could not begin work on Schedule 7A until these other schedules were completed. Under these circumstances, it is a strange coincidence that the engineers should begin to discuss the suspension of the contract just after Weisberger had discovered the defects in the plan of construction and requirements of the engineers and began asking for modifications (Trans. 215).

The letter of the Acting Supervising Engineer (Defendants' Ex. W, Trans 74) shows the attitude of these officials and what they had in mind. The letter is dated September 27th, 1907, and says in part:

"As matters now stand, Weisberger's success or failure in his work rests practically on the action of the engineers. One may say he is almost wholly dependent on their favorable consideration and treatment, and it would appear to be a very unbusiness-like proceeding on the part of Weisberger himself to antagonize in any way the engineers by refusing to carry out so obviously reasonable an obligation and one which involves so small an expenditure."

This letter and the implied threat of suspension in Jacobs' letter, show the mental attitude of the engineers and brings out the fact that they considered

that, under the drastic provisions of the contract they had Weisberger at their mercy and could make or break him as they might see fit. Evidently when he began to criticise their plans and ask for changes, they decided to break him rather than have the defects and fallacies of the plans and method of construction aired in the department and before the public. We do not mean to infer that any of these men deliberately or maliciously planned to ruin Weisberger or injure him, but they were merely acting on the impulse of the first law of nature—self preservation. With the work in their own hands there would be no one to see or criticise the faults in the plans or to raise any question if they were not carried out as originally designed.

It was in the power of these men to have offered Weisberger the relief which he asked and of which the Government promptly took advantage after the ejection of Weisberger from the work. The fact that Weisberger presented his application for change to all the engineers from the lowest to the highest, and finally took it to Washington himself, but never received any relief, does not put them in a favorable light.

Thus the matter stood at the time the Acting Director wrote the letter recommending suspension

of the contract. We respectfully request a most careful perusal of this instrument by the Court and comparison of the statements therein contained with the uncontradicted testimony of the witnesses:

Department of the Interior, United States Reclamation Service, Washington, D. C. Office of the Director.

The Honorable, The Secretary of the Interior:

Sir: On January 5, 1907, contract was entered into with Theodore Weisberger for the construction and completion of Schedules 6A and 7A of the main canal, Tieton project, Washington, said work consisting of manufacturing, furnishing, distributing and laying concrete shapes. Schedule 6A was to have been completed on or before November 1, 1907, and Schedule 7A on or before March 31, 1908. On October 23, 1907, the time of completion of Schedule 6A was extended to August 1, 1908, and of Schedule 7A to October 15, 1908.

Work on Schedule 6A was not commenced until August 2, 1907, whereas it should have been well under way by that time had work been begun in the spring as required by the terms of the contract, and a similar condition prevailed in the commencement of work under Schedule 7A.

The contractor was repeatedly urged by the engineers to expedite the installation of his plant for the commencement of work on Schedule 7A, and on October 9 written directions were given him to begin laying shapes under that schedule, but the instructions were not complied with, the contractor claiming that it was impossible to do so and that he was doing all that he could do to begin work as early as possible.

When work was finally begun, on November 15, the season was so far advanced and the weather had

become so severe that he was compelled to stop, and on November 23 all work on both schedules was discontinued.

At the same time the contractor closed his camp and shop and has since done nothing towards getting ready for next season's work, although with the number of forms now on hand it will be impossible to start the plant at its full capacity when spring opens. No forms have been made for the tunnel shapes and nothing done towards getting ready for their manufacture.

In conversation with the engineers on January 1 the contractor stated that, owing to his poor financial condition, he was unable to begin work in preparation for next season, and that in all probability he would be unable to complete his contract this year or to resume operations at all.

Since that time Mr. Weisberger has endeavored to make arrangements with surety companies such that he could satisfy the Government as to his financial ability to carry his contract to completion, but he has today advised this office orally that he will be unable to do so, and he has withdrawn all objection to the suspension of the contract.

I therefore respectfully recommend that the contract be immediately suspended and that the United States take over the work, together with all machinery, tools, appliances, and animals employed on the work, and all materials and supplies of any kind shipped or delivered by or on account of the contractor for use in connection with the contract.

If the work is to be completed in time to have water in the Tieton Canal at the beginning of the irrigation season of 1909, the work must be taken in hand immediately and pushed to completion by the Reclamation Service without advertising for new bids, and it is believed at the present stage of the operations it would be impossible to secure reasonable bids for the completion of the work. I there-

fore recommend that the work under this contract be completed by force account.

Very respectfully,

MORRIS BIEN,
Acting Director.

Approved as recommended February 1st, 1908.

JAMES RUDOLPH GARFIELD,
Secretary.

We believe that a perusal of the foregoing instrument must convince the Court that it contains so many misstatements concerning the performance of the contract and what had been done by the contractor, that the Secretary of the Interior could not have other than an erroneous opinion of the matter, and that his action, based upon this communication, was necessarily taken under such a gross mistake regarding the facts as to prevent the exercise of a fair and unbiased judgment in the premises, and amounted to a constructive fraud upon the defendants. So far as appears from the record, the Secretary made no investigation and had no other report or information before him than that contained in this letter. It is very apparent that the letter was presented to the Secretary and he, relying upon his confidence in the Acting Director of the Reclamation Service, approved the recommendation without making any effort to ascertain the facts for himself.

The first reason for suspension given in the letter

of the Acting Director is that work on Schedule 6A was not commenced until August 2nd, 1907, that being the date the first shape was actually manufactured. We wonder if this official, sitting back in Washington, thought that Weisberger could commence manufacturing these shapes without any preliminary work. The uncontradicted evidence shows that Weisberger commenced work in December and had worked continuously from that time until the first shape was turned out. The evidence shows that this work was delayed several months by the action of the Government in failing to complete the road which it had agreed to construct, so that he could get his machinery on the ground for manufacture. Clearly the statement as to the date of commencing work is contrary to the facts.

The second reason given is that the contractor was repeatedly urged by the engineers to expedite the installation of his plant, and on October 9th written directions were given him to begin laying shapes, but the instructions were not complied with. Mr. Weisberger testifies (p. 227) and his testimony is not refuted, that he never received any notice to begin laying shapes as provided in the contract. The only directions which were ever given him in this regard by the Government engineers was the letter

of October 22nd (Trans. p. 72), in which he was advised to delay the laying of shapes until the matter of the cracks which were developing therein could be discussed by the District Engineer and the Supervising Engineer. About this date, the contract was extended, but he never received any notice to begin laying shapes.

The next statement is that when work was finally begun on November 15th, the weather had become so severe that the contractor was compelled to stop. The record shows that work had been going on for some time; that Weisberger had begun the work of placing the shapes in the canal prior to the receipt of the letter dated October 22nd; that the work was suspended at the request of the engineer, and subsequently without any demand upon the part of the Government engineers was voluntarily resumed and shapes were laid in the canal between the 10th and 20th of November (Trans. p. 325).

The Director states that in conversation with the engineers on January 1st, the contractor stated that owing to his poor financial condition he was unable to begin work in preparation for next season. Mr. Weisberger testifies positively that he never made any such statement (Trans. p. 342).

The next statement is that Weisberger had stated

that he could not make financial arrangements and had withdrawn all objection to the suspension of the contract. Weisberger positively denies this and denies that he ever consented to or acquiesced in the suspension in any way, but was at all times fighting to prevent suspension (Trans. p. 224).

The Government introduced absolutely no evidence in support of the statements contained in this letter of Morris Bein's to the Secretary, nor did it produce any evidence to rebut the testimony that was given by the defendants, which contradicted the statements in the letter. As the Lower Court ruled, the statements in the letter are no evidence against the defendants. As the record shows, practically every statement contained in this communication as a basis for the suspension of the contract, is not in accordance with the facts. How then, could the Secretary, in acting upon this communication, do otherwise than act under such a gross mistake as to the facts as to constitute a fraud upon the defendants?

It is further stated in the letter that the contractor has done nothing toward getting ready for the spring work and that with the number of forms on hand it will be impossible to start the plant at its fullest capacity; that the work must be taken in

hand immediately if the canal is to be completed in time for the irrigation season of 1909. Weisberger's testimony shows (Trans. pp. 218-19) that he had on hand about 240 forms and had ample time to construct others if necessary; that he was engaged in hauling supplies and getting ready for next season's work but the Government had obstructed the road (Trans. pp. 378-360). The evidence further shows that the Government itself did not begin work until May and did not complete the canal until October 15th, 1909, after, instead of before, the irrigation season.

Apparently the Secretary read this communication, took up his pen and signed his name under the words "approved as recommended," without independent investigation of the facts and without any other or further knowledge than that which he obtained from the letter.

We submit that this was not such a performance of the duties which were entrusted to him under the terms of the contract as were contemplated; that he should not have acted on this letter without some investigation. Weisberger was in Washington trying to get an interview with him but could not do so (Trans. 344).

The Government was the first to default in the

performance of the contract in that it did not construct the wagon road or keep it open so as to enable Weisberger to carry on his work, and retarded the prosecution of the enterprise by its delay in building the road and in the preparation of the canal for receiving the lining. Having been the first to make default, the Government could not insist upon the strict performance of the contract by the contractor.

Anvil Mining Co. vs. Humble, 153 U. S., 540, 552;

U. S. vs. Peck, 102 U. S., 64;

Dist. Col. vs. Camden Iron Works, 181 U. S. 453, 463;

Itner vs. U. S., 43 Crt. Cls. Rep. 336, 351;

Blair vs. Wilkinson Coal Co., 54 Wash., 334, 351;

Standard Gas Light Co. vs. Wood, 61 Fed. R. 74;

King Iron Bridge Co. vs. St. Louis, 43 Fed. R. 718;

Erickson vs. U. S., 125 Fed. 887;

Landen Bank vs. Tenn. P. Co., 122 Fed. 298;

Dodd vs. Clinton, 1899, 12 B, 562, 567.

As is said by Justice Brewer in Anvil Mining Co. vs. Humble, *supra*:

“Generally speaking, it is true that when a con-

tract is not performed, the party who is guilty of the first breach, is the one upon whom rests all the liability for non-performance."

As far back as the 17th century it is stated in Comyns' Digest, Condition L (6):

"So the performance of a condition shall be excused by the obstruction of the obligee; as, if a condition be to build an house; and he, or another by his order, hinders the going upon the land. Or says that it shall not be built. Or interrupts the performance (1st Rol. 454, 1, 5, 20)."

We quote from *Dodd vs. Clinton*, *supra*:

"It is a well ascertained rule of law that where the failure of a contractor to complete the work by a specified day has been brought about by the act of the other party to the contract, he is exonerated from the performance of the contract by that date which has been thus rendered impossible. It has been often laid down that where there is provision that a contractor shall pay penalties for delay as in the present case, no penalty can be recovered where delay has been occasioned by the act of the persons endeavoring to enforce the penalties."

In *Ittner vs. U. S.*, *supra*, Judge Atkinson, following the decisions of the Supreme Court of the United States, in *U. S. vs. Peck*, and *District of Columbia vs. Camden Iron Works*, above cited, says:

"It is well settled that where one of the parties to a contract demands strict performance as to time by the other party, he must comply with all of the conditions requisite to enable the other party to per-

form his part, and a failure on the part of the one demanding performance to do all the preliminary work required by him to enable the other party to complete the work within the time limit, operates as a waiver of the time provision in the contract."

In *Arterial Drainage Co. vs. Rathangan Drainage Board*, 6 Law Rep., Irish, 513, the engineer certified in accordance with the provisions of the contract that the contractor was not proceeding with the work with due diligence, and took possession of the work. The contractor claims that failure to make progress was due to the default of the other party in the performance of its duties under the contract. It was held that this being established was a complete reply, and the owner of the works had no right to take possession under the engineer's certificate.

This doctrine was reaffirmed in a case decided by the Judicial Committee of the Privy Counsel in 1904,

Lodder vs. Slowey, 1904 Appeal Cases 442, 452, 453:

"Their Lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself, or his agent."

In *McDonald vs. Can. So. Ry.*, 23 Upper Can. Queen's Bench, 313, in passing upon a provision for annulment upon the recommendation of the engineer for failure on the part of the contractor to make satisfactory progress, the Court said:

“The provision in this case, although it begins with the preamble before mentioned, does not, we think, constitute the engineer the judge or referee to decide whether or not the defendants did or did not delay the plaintiff in the course of his work. The engineer had plainly the right to determine that in his opinion there were grounds to apprehend that the plaintiff would not complete his work in the manner and within the time specified; but if he came to that conclusion when and by reason of the plaintiff having been improperly retarded by the defendants or by the engineer himself, it would be an exercise in excess of his power.”

In *King vs. U. S.*, 37 C. Cls., 428, it was held that if the acts of the Government prevented the contractor from performing, an annulment of the contract by the engineer could not be sustained. Chief Justice Knot says:

“A contracting party cannot prevent his contractor from performing and then annul the contract because he has not performed.”

In *Harvey vs. U. S.*, 8 C. Cls., 501, the Court says:

“The ground of complaint was the tardy progress of the work which the defendants themselves produced, by neglect to furnish the working plans and

materials as they were bound under the contract. And now to justify the action of the officer of the Government in ejecting the claimants, would be to justify one breach of the contract by another, which no court can do."

The Government having been itself in default, and having caused a large part of the delay, it was certainly not acting in good faith when it attributed this delay to Weisberger as a basis for suspending the contract.

Furthermore, we think that there had practically been a waiver of any right to suspend by the Governmental officers until such time as it might be demonstrated in the opening of the season of 1908 that Weisberger could not perform the contract. The employees and engineers of the Government had acted all through the Fall in such manner as to lead Weisberger to believe that they did not intend to suspend the contract. The time of performance was extended on October 28, just before the work was shut down. It is held that there is an implied waiver of forfeiture, not only if notice to determine be not given within a reasonable time, but if the owner acts in such manner as to raise the impression that he does not intend to determine the contract.

Marsden vs. Campbell, 28th Weekly Reporter, 952.

The notice was not sufficient, did not comply with

the provisions of the contract, and furnished no sufficient basis for the suspension.

Munday vs. U. S., 35 Ct. Cls., 265;

U. S. vs. O'Brien, 220 U. S., 321;

Champlain Construction Co. vs. O'Brien, 104 Fed., 930;

In contracts containing provisions for forfeiture, it is always implied that the public officer in whom this authority is vested, will not act arbitrarily or capriciously:

Ripley vs. U. S., 225 U. S., 695, 701;

U. S. vs. N. A. C. Co., 74 Fed. 145;

Chapman vs. Low, 4 Cushing, 378;

Kilberg vs. U. S., 97 U. S., 398;

Bowrey National Bank vs. Mayer, 63 N. Y., 336;

Hawkins vs. Graham, 149 Mass., 284;

L. E. & L. L. Ry. vs. Donnigan, 111 Ind., 179;

Blackwell vs. Borough of Derby Supplement to 3rd, Ed. Hudson on Bldg. Contracts, p. 29-30. (This is an English Court of Appeals case and we have not been able to find it in the reports.)

Utah Stage Co. vs. U. S., 39 Ct. Clms., 429, 439.

The party who has agreed to be bound by the judgment of the officer is entitled to have it exercised in good faith by the officer nominated, and cannot be bound by the substituted judgment of another authority.

U. S. vs. N. A. C. Co., *supra*;

Champlain Construction Co. vs. O'Brien, *supra*;

Harvey vs. U. S., 8 Ct. Cls., 50;

King vs. U. S., 37 Ct. Cls., 428;

Hawkins vs. Graham, 149 Mass., 284;

In the case of Ripley vs. U. S., above cited, the Supreme Court says in the decision:

“The contractor had no redress unless the action of the Secretary in suspending the contract was the result of fraud or such gross mistake as would imply fraud (citing *Martinsburg & P. R. Co. vs March*, 114 U. S. 549; *U. S. vs. Mueller*, 113 U. S. 153); but the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent’s judgment should be exercised, not capriciously or fraudulently, but reasonably, and with due regard to the rights of the contracting parties. The finding by the Court that the inspector’s refusal was a gross mistake and an act of bad faith necessarily therefore leads to the conclusion that the contractor was entitled to recover damages caused thereby.”

In *U. S. vs. N. A. C. Co.*, *supra*, Judge Wallace says:

“It is not unusual for the contractor with the Government, as with other municipal bodies, to repose upon the good faith and discretion of some public officer who represents the Government and is responsible for the protection of its interests in the transaction. Such contractors frequently consent to stipulations by which the value of the contract is substantially controlled by the judgment of such an officer. In such contracts, however, it is implied that the public officer will not act arbitrarily or capriciously, but will exercise an honest judgment. The party who has agreed to be bound by that judgment is entitled to have it exercised in good faith by the officer nominated and cannot be bound by the substituted judgment of another authority.”

So here we think if the Secretary of the Interior had made an investigation of the matter himself and not relied upon the representations of one of the Government officers who was really an interested party, that the result would probably have been very different. Instead of having the judgment of the Secretary of the Interior in this case, Weisberger really had the substituted judgment of the Acting Director of the Reclamation Service.

In *Champlain Construction Co. vs. O'Brien*, *supra*, the Court said:

“The exclusion of a person from his property under such proceedings is so contrary to common right that the provisions for them should be strictly followed, and these do not appear to have been so followed, nor to have afforded sufficient ground for taking it over.”

As is said in a number of the cases cited, forfeitures are not favored in law, and unless enforced according to their letter and requirements, become inoperative.

In *Williams vs. U. S.*, 26 C. Cls., 132, the Court says:

"The power of forfeiture must be construed strictly, and if any antecedent duty is omitted, an exercise of the power becomes unlawful as against the rights of the other party. * * * * * It did not appear in that case, nor does it appear in this case, that a notice had been served on the claimant of the intended purpose of the Government to exercise the power of forfeiture contained in the agreement."

Counsel for plaintiff in error argue that because the trial court, in its opinion overruling the motion for judgment, stated that he found no evidence which would warrant the jury in finding that the Secretary of the Interior acted fraudulently or capriciously in suspending the contract, therefore there is only one issue before this Court, i. e., was the contract impossible of performance as made.

This statement in the opinion of the trial court doesn't limit the issues before this Court. Such opinion is no part of the record and cannot be considered. The Court submitted to the jury the question as to whether or not the Secretary acted fraud-

ulently or under a gross mistake of fact in suspending the contract. We do not claim that the Secretary was guilty of actual and deliberate fraud, but we do claim that he was negligent in the performance of the duty entrusted to him; that he did not make any proper investigation of the facts; that the statement put before him by the Acting Director was misleading and not in accordance with the facts. In accepting this statement and acting upon it, the Secretary was necessarily laboring under such a gross mistake as to the facts that it was impossible for him to exercise an honest judgment in the premises, and therefore the suspension was constructively fraudulent. The jury was warranted in finding for defendants on this issue and their verdict is not affected by the views of the trial judge expressed after the rendition of the verdict.

Nor is there anything in the contention that the two defenses are inconsistent. No objection was made to the introduction of evidence on this ground, nor was there ever any motion to require defendants to elect as to which defense they would stand on, nor demurrer to, nor motion to strike the affirmative defenses on the ground that they were inconsistent with each other or with the general issue pleaded. This being so, no question of "inconsistency" can now be raised.

In fact, the defenses are not inconsistent. If the contract could not be performed as made then it was the duty of the Government officials to allow such changes as would have made it possible, application for which were pending at the time of the suspension. If the plans, specifications and requirements of the Government engineers could not be carried out, this in itself was sufficient to stay the hand of the Secretary in suspending the contract and taking from the contractor his equipment and practically ruining him. Instead of taking the drastic action which was taken, the contractor should have been given an interview; and means should have been devised whereby he could go on with the work or else he should have been allowed to annul the contract and withdraw therefrom with his equipment and compensation for work done. Investigation on the part of the Secretary, or by some unbiased person for him would have revealed the true condition of affairs. If the contract as made by the Government was impossible of performance, or entered into under a mutual mistake of fact, then surely the Government was not entitled to seek to enforce it against the contractor and the action of the officials in excluding him from the work and taking possession of his equipment was fraudulent and unwarranted.

PERFORMANCE BY GOVERNMENT.

When the Government took over the contract and undertook to complete the construction of the canal, it demonstrated that it was impracticable and impossible to construct the canal according to the plans and specifications of the contract, and departed very materially from the plan of construction as therein provided. (See stipulation as to changes, Transcript Davis, p. 128-130-131; Heney, p. 160-161; Crownholm, p. 304; King, p. 329, 372.)

This testimony shows that when the Government did the work, the allowance in making the shapes true to radius was enlarged two or three times over the allowance made Weisberger by the inspectors; the form of the cross-bar was changed to give more strength to the shapes; instead of requiring the shapes to be brought practically together and jointed with a joint only one-eighth of an inch in ^{width} ~~thickness~~, the joint was allowed to be made whatever width might be necessary to follow the line of the canal and make a smooth surface, the joints varying from $1\frac{1}{2}$ to 6 inches in width, thus making it practicable to so place the shapes that the line of the canal could be followed and the projections in the interior overcome by bevelling these joints. Many other changes were made, as is shown by the stipulation as to

changes, among which was the changing of Log Slide Tunnel, 1000 feet in length, to an open cut, increasing the length to 2394 feet; Weddle Tunnel, 440 feet in length, was changed to an open cut; tunnels at Stations 515 and 530 were changed to open cut; Trail Creek Tunnel, 3120 feet in length, was lined with monolithic lining instead of shapes; all of the flumes and flume supports were cut out, rock fills being substituted; many other changes were made. In fact, there was practically an entire change in the method of lining the canal and a very wide departure from the original plans.

To entitle the Government to recover against the defendant in this case, it was necessary to show that when it took over the work it performed substantially the same contract as that which Wesiberger had agreed to perform. If there was any substantial departure therefrom, the Government could not recover the excess cost, if any, because the work done by it being other than that which the contractor had undertaken to perform, there would be no way of determining the difference in cost.

Moody vs. U. S., 35 Ct Cls., 265, 288;

American Bonding Co. vs. Gibson, 127 Fed. R., 671, 674;

While it is true that the contract provides that changes may be made, yet this provision is only applicable when the contractor is performing the contract. If the Government saw fit to take the contract out of his hands and perform it itself, it had no right to make any material changes, but was bound to construct the canal as provided for in the contract. If it was impossible to do this, then certainly the Government could not do other and different work than that provided in the contract and seek to hold the contractor for the difference. If this were permissible, there would be no protection whatever for the contractor; it would enable the Government officials to take out of his hands the performance of the contract and do other and different work, the cost of which might be greatly in excess of that which he had agreed to do. It is apparent that this might give rise to the greatest injustice. When a man signs a contract such as the one under consideration in this case, and gives to the Government and its officials the power and control which is herein given, he has a right to rely upon the presumption that the Government officials will act in good faith and in accordance with the spirit and intent of the contract. Otherwise, the contractor might as well have no contract at all and merely agree that,

upon demand, he will turn over all of his equipment to the Government, and allow it to do as it sees fit therewith, and pay whatever the Government officials may see fit to charge him with. As was said by Chief Justice Knot in *Utah Stage Co. vs. U. S.*, 39 Ct. Cls., 420-439:

“To hold otherwise, would be to hold that this carefully prepared contract with the elaborate specifications thereto annexed, might be reduced to three lines: The undersigned in consideration of \$., covenants and agrees that during the next four years he will do whatever the Post Office Department bids him.”

This case was affirmed in 199 U. S., 414.

If the verdict of the jury in this case had been set aside, judgment could not have been entered for the plaintiff in error, as the Government failed to prove facts sufficient to sustain its action against the defendant, Weisberger. Under the issues as made by the pleadings, it was incumbent upon the Government to prove performance of the contract on its part—that it had constructed and repaired the wagon road which it agreed to construct before the contractor was bound to begin work; that it had done the work under Schedules 1, 2, 3, 4, and 5, which was necessary to be done before the contractor could be required to begin the laying of the shapes in the canal; that the work done by it was the work which

Weisberger had agreed to perform; what amount of moneys it expended therein and for what the money was expended.

It is true that the contract, Sec. 8, provides that upon all questions concerning the execution of the work, the classification of the materials, and the determination of costs, the decision of the chief engineer shall be binding on both parties, but we think that this can only mean that his decision and determination of costs shall be binding when the work is done by the contractor. It would be going altogether too far to say that the Government can charge the contractor with whatever cost the chief engineer may determine without any evidence as to the reasonableness thereof, when the work has been taken out of the contractor's hands and is being done by the party whose servant this engineer is. The contractor had no longer any right to be upon the work or any means of determining the reasonableness of such cost. This is a very different situation than when the contract is re-let to another contractor, for then the price of the second contract establishes the cost.

As stated in defendant's motion for non-suit (Trans. p. 137) the Government failed to prove the performance of the contract on its part; failed to

prove what work it did or what moneys it expended, or what was the reasonable cost of any work which it did—or that it had not been reimbursed for any moneys which it may have expended. The only evidence which the Government introduced was a lot of cost sheets which were not identified or proven by anyone having any knowledge thereof. Mr. Davis, the chief engineer, was put on the stand to testify that he had determined and certified this cost, but Davis testified that he had not approved the determination as to cost in the regular manner, that he did not make the original entries or have any knowledge thereof, except what he had received from his subordinates. Mr. Davis testified as to how such costs are regularly certified. But no such certification in regular form signed by the proper officer was offered by plaintiff. (Trans. pp. 102-113.) Under no rule of evidence would this testimony have been admitted if a private individual were seeking to prove an account.

Chafee vs. U. S., 85 U. S. 516.

We do not understand why it should be accepted as evidence in favor of the Government in a case like this, and especially why it should be accepted as final and conclusive. When the Government institutes a suit against an individual, it places itself up-

on the same footing as any other litigant and is bound by the same rules of evidence. The Government should have been required to either produce the parties who did the work and had knowledge thereof and of its cost, or else to have produced the accountants who made the original entries in regard to these transactions. At least it should have introduced a cost statement certified and proved in the manner provided by law. Defendants had a right to know, and it was the duty of the Government to prove what moneys had been expended, and for what they were expended, and this proof should have been made in some manner recognized by the rules of evidence. The trial court stated that it was "under the impression the proof is a little lame." It was more than lame—it couldn't and shouldn't have been allowed to stand unsupported. Nor could it be strengthened by the presumption that the accounts were correct because made by public officials who are presumed to have done their duty. Such presumption does not supply proof of a substantive and material fact and is never held to be a substitute for such proof.

U. S. vs. Carr, 132 U. S., 644, 653.

U. S. vs. Ross, 92 U. S., 281.

The equities of this case are all with the defendant.

The Government has had the benefit of all the contractor's efforts and equipment. The verdict of the jury is sustained by the evidence and we respectfully submit that the judgment entered on such verdict should be affirmed.

PARKER & RICHARDS,

Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT DONALDSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the Northern District of California, First Division.

FILED

APR - 3 1913

No. 2248

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT DONALDSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the Northern District of California, First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. —.

THE UNITED STATES

vs.

ROBERT DONALDSON.

Praeceptum for Transcript.

To the Clerk of the said Court:

Sir: Please make return to the Writ of Error issued by transmitting to the United States Circuit Court of Appeals for the Ninth Circuit true copies of the following, to wit:

1. The Indictment in full, with all the endorsements thereon.
2. Plea of said defendant Robert Donaldson.
3. Minutes of Trial.
4. Verdict.
5. Motion for New Trial.
6. Order Denying Motion for New Trial.
7. Judgment.
8. Bill of Exceptions.
9. Petition for Writ of Error.
10. Assignment of Errors.
11. Order Allowing Writ of Error and Supersedeas.
12. Bond on Writ of Error. [1*]

Also transmit original Writ of Error and original Citation thereon, together with endorsement thereon

*Page-number appearing at foot of page of original certified Record.

of admission of service on defendant in error, and certify to the above as being the return to the Writ of Error.

Dated, January 24th, 1913.

FRANK R. SWEASEY,
CARL E. LINDSAY,

Attorneys for Plaintiff in Error.

[Endorsed]: Filed Jan. 25, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [2]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

Indictment.

At a stated term of said Court, begun and holden at the City and County of San Francisco, within and for the State and Northern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and twelve.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: That

HENRY GALLAGHER and ROBERT DONALD-
SON,

hereinafter called the defendants, heretofore, to wit, on the first day of December, in the year of our Lord one thousand nine hundred and eleven, at San Francisco, in the State and Northern District of California then and there being, did then and there knowingly, wilfully, wickedly, unlawfully, corruptly

and feloniously conspire, combine, confederate and agree together and with one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler, and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, that is to say:

They, the said defendants did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously, conspire, combine, confederate and agree together and with said David G. Powers and Emil Fiedler also known as K. E. Fiedler, and said divers [3] other persons whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently and knowingly, import and bring into the United States at the port of San Francisco, in the State and District aforesaid, and assist in so doing, certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, contrary to law.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December, in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, did introduce one David G. Powers to the boatswain and the engineer's cabin

boy of the steamer "Siberia," the names of which said last named persons are, to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December, in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, [4] did propose to said David G. Powers and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship "Siberia" in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said Henry Gallagher, on the thirteenth day of December, in the year of our Lord one thousand nine hundred and eleven, did go with the said David G. Powers, from the City and County of San Francisco, to the City of Oakland, in the State and District aforesaid.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That

HENRY GALLAGHER and ROBERT DONALD-
SON

hereinafter called the defendants, heretofore, to wit, on the first day of December, in the year of our Lord one thousand nine hundred and eleven, at San Francisco, in the State and Northern District of California, then and there being, did then and there knowingly, wilfully, wickedly, [5] unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler, and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, that is to say:

They, the said defendants, did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously, conspire, combine, confederate and agree together and with said David G. Powers and Emil Fiedler, also known as K. E. Fiedler, and said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently and knowingly, receive, conceal and facilitate the transportation and concealment after importation, certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid, unknown,

and for that reason not herein set forth, contrary to law, and which said opium prepared for smoking purposes would be, as each of the defendants then and there well knew, opium which had been theretofore imported into the United States contrary to law, from some foreign port or place to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December, [6] in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer "Siberia," the names of which said last named persons are, to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, did propose to said David G. Powers, and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship "Siberia," in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Henry Gallagher, on the thirteenth day of December in the year of our Lord one thousand nine hundred and eleven, did go with the said David G. Powers, from the City and County of San Francisco, to the City of Oakland, in the State and District aforesaid. [7]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That

HENRY GALLAGHER and ROBERT DONALD-
SON,

hereinafter called the defendants, heretofore, to wit, on the thirteenth day of December in the year of our Lord one thousand nine hundred and eleven, in the bay of San Francisco, in the State and Northern District of California, then and there being, did then and there unlawfully, wilfully, feloniously, fraudulently and knowingly import and bring into the United States and assist in so doing, certain opium and a certain preparation of opium, to wit, three hundred and twenty five-*tael* cans of opium prepared for smoking purposes, from some foreign port or place to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that the said defendants did commit the offense set forth in this count of this indictment by then and there unlawfully, knowingly, wilfully and feloniously aiding and abetting, counselling, inducing and procuring, the commission of the said offense by one David G. Powers and one Emil Fiedler, also [8] known as K. E. Fiedler.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

FOURTH COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That

HENRY GALLAGHER and ROBERT DONALDSON,

hereinafter called the defendants, heretofore, to wit, on the thirteenth day of December, in the year of our Lord one thousand nine hundred and eleven, at Oakland, in the County of Alameda, in the State and Northern District of California, then and there being, did then and there unlawfully, wilfully, feloniously, fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium and of a certain preparation of opium, to wit, three hundred and twenty (320) five-tael cans of opium prepared for smoking purposes, which said three hundred and twenty five-tael cans of opium prepared for smoking

purposes had been theretofore, as they, the said defendants and each of them then and there, to wit, at the time and place aforesaid, well knew, had been imported into the United States contrary to law, from some foreign port or place to the Grand Jurors aforesaid, unknown. [9]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that the said defendants did commit the offense set forth in this count of this indictment by then and there unlawfully, knowingly, wilfully and feloniously aiding and abetting, counselling, inducing and procuring, the commission of the said offense, by one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

J. L. McNAB,

United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment:

D. G. POWERS.

W. H. TIDWELL.

JOSEPH HEAD.

J. G. STONE.

[Endorsed]: A true bill. A. S. Carman, Foreman Grand Jury. Presented in open court and filed Sep. 20, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [10]

**[Minutes—November 25, 1912—Arraignment, Plea,
Order of Severance as to Henry Gallagher, Trial,
etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 25th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON et al.

The defendant Robert Donaldson being present in open court with his counsel, Carl Lindsay, Esqr., and Frank Sweasey, Esqr., said defendant was then and there duly arraigned upon the indictment herein against him, to which said indictment he then and there pleaded not guilty, which said plea was by the Court ordered and is hereby entered. On motion of S. C. Wright, Esqr., attorney for defendant Henry Gallagher herein, no objection being made thereto, by the Court ordered that a severance as to said defendant for trial be, and the same is hereby granted.

On motion of John L. McNab, Esqr., U. S. Atty., by the Court ordered that the trial as to defendant Robert Donaldson do now proceed: The following named jurors were duly drawn, sworn, examined,

accepted and impaneled to try the case, to wit: E. C. Elwood, F. C. Dorris, Geo. W. Eliassen, N. B. Eckeles, Thos. Murphy, H. S. Engle, J. W. Elrod, Ben D. Dixon, Norman Ellsworth, Edmund Hayward Haas, A. G. Dick, A. E. Almind.

C. E. Carlson and Geo. B. Scott, jurors drawn, were by defendant excused. [11]

James Dunn, a juror drawn, was excused by the Government.

E. P. Berry, a juror drawn, was excused by consent.

Mr. McNab, the U. S. Atty., stated the case and called David G. Powers, K. E. Fiedler, Young Tai, and Joseph Head, who were each duly sworn and examined on behalf of the United States.

Mr. Sweasey, one of the attorneys for defendant, made a motion that Court instruct jury to acquit, which said motion was by the Court denied.

Mr. Lindsay, one of attorneys for defendant, called Robert Donaldson, R. P. Schwerein, Arnold Foster, D. G. Fraser, who were each duly sworn and examined on behalf of defendant. The case was then argued by Benj. L. McKinley, Asst. U. S. Atty., and Carl Lindsay for defendant, and thereupon the further trial was continued until to-morrow at 10 o'clock A. M. [12]

[Minutes—November 26, 1912—Trial (Resumed).]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 26th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON.

The jury sworn to try the case and the defendant with his counsel being present in open court, the further trial of this case was resumed. John L. McNab, U. S. Attorney, argued the case, and thereupon the Court charged the jury, who thereupon retired to deliberate upon their verdict and at 12 o'clock M., returned into court with the following verdict in writing: "We, the jury, find Robert Donaldson, the defendant at the bar, not guilty on the 1st and 3d counts of the indictment and guilty on the 2d and 4th counts of the indictment. Ben D. Dixon, foreman," which said verdict was by the Court ordered and is hereby recorded, and to which verdict each juror upon being asked if that was his verdict replied in the affirmative. Further ordered that defendant appear for judgment on November 29, 1912, at 10 o'clock A. M. [13]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5137.

THE UNITED STATES OF AMERICA

vs.

ROBERT DONALDSON.

Verdict.

We, the Jury, find Robert Donaldson, the defendant at the bar, not guilty on the 1st and 3d counts of the indictment, and guilty on the 2d and 4th counts of the Indictment.

BEN D. DIXON,

Foreman.

Filed Nov. 26, 1912, at 12 o'clock and — minutes
M. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [14]

**[Notice of Motion to Set Aside Verdict and to Grant
a New Trial.]**

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5137.

UNITED STATES

vs.

HENRY GALLAGHER and ROBERT DONALD-
SON,

Defendants.

MOTION OF DEFENDANT ROBERT DONALDSON FOR A NEW TRIAL.

To the Clerk of the Above-entitled Court, and to J.
L. McNab, United States Attorney:

YOU WILL PLEASE TAKE NOTICE that on the 29th day of November, 1912, at the opening of court on said date, or as soon thereafter as counsel can be heard, ROBERT DONALDSON, one of the defendants in the above-entitled action, will move said Court to set aside and vacate the verdict of the jury herein against said defendant ROBERT DONALDSON and to grant said defendant a new trial in said cause, on the following grounds:

1. Insufficiency of the evidence to justify said verdict and that the same is against law.

2. Errors of the Court occurring at the trial affecting the substantial rights of the said defendant ROBERT DONALDSON to which exceptions were duly taken.

3. That the indictment in said cause fails to state an offense against the laws of the United States.
[15]

4. That the Court misdirected the jury in matters of law and erred in its charge to the jury.

Respectfully,

FRANK R. SWEASEY,

CARL E. LINDSAY,

Attorneys for Said Defendant.

Service of copy of the above and foregoing is hereby duly admitted this 27th day of November, 1912.

JOHN L. McNAB,
United States Attorney.

[Endorsed]: Filed Nov. 27, 1912. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [16]

[Minutes Nov. 30, 1912—Motion for New Trial, etc.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 30th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON.

**[Minutes—Nov. 30, 1912—Motion for New Trial,
etc.]**

The defendant herein being present in open court with his counsel, said defendant was called for judgment: Thru his counsel said defendant then and there made a motion for a new trial, which was by the Court denied. He then made a motion in arrest of judgment, which said motion was by the Court denied. The defendant being fully informed by the Court of the nature of the indictment herein against him, of his plea of not guilty and of his trial and the verdict of the jury, and no sufficient cause being shown or appearing to the Court why judgment should not be pronounced against him, now here by the Court ordered that said defendant be, and he is hereby sentenced to be imprisoned for the term of one

year in the County Jail of Alameda County, California, and that he pay a fine of \$200, and in default of the payment of said fine, that he be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law. [17]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 30th day of November, in the year of our Lord one thousand nine hundred and twelve.
Present: The Honorable JOHN J. DE HAVEN.

No. 5137.

Convicted of Importing Opium into the United States.

THE UNITED STATES OF AMERICA,

vs.

ROBERT DONALDSON,

Defendant.

Judgment.

JUDGMENT ON VERDICT OF GUILTY.

John L. McNab, Esquire, *Assistant* United States Attorney, the defendant with his counsel, Carl Lindsay and Wm. Sweasey, Esqs., came into court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 30th day of September, 1912, charging him with the crime of importing and bringing opium into U. S. and conspir-

ing to import and bring opium into the U. S.; of his arraignment and plea of Not Guilty, of his trial and the verdict of the Jury on the 26th day of November, 1912, to wit: "We, the Jury find Robert Donaldson, the defendant at the bar, Not Guilty on the 1st and 3d counts of the Indictment and Guilty on the 2d and 4th counts of the Indictment."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court; [18]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said Robert Donaldson, having been duly convicted in this court on the 2d and 4th counts of the Indictment herein, be and he is hereby sentenced to be imprisoned for the term of 1 year in the Alameda County Jail, and further, that he pay a fine of \$200, and in default of the payment of said fine that he be further imprisoned until said fine be paid.

December 3d, 1912.

JOHN J. DE HAVEN,
United States District Judge, Northern District of
California.

[Endorsed]: Filed Dec. 3, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [19]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5137.

UNITED STATES

vs.

HENRY GALLAGHER and ROBERT DONALD-
SON,

Defendants.

**Petition for Writ of Error by Defendant Robert
Donaldson, and Order Allowing Writ.**

The petitioner, ROBERT DONALDSON, respectfully represents:

That heretofore, to wit, on the 30th day of November, 1912, by final judgment of the District Court of the United States, in and for the Northern District of California, First Division, rendered and entered in a criminal action therein pending and in which the United States is plaintiff and your petitioner defendant, it was adjudged that your petitioner was guilty of the offense of conspiracy, as charged in the Second Count of the Indictment in the above-entitled criminal action, and of the offense of receiving, concealing and facilitating the transportation and concealment after importation of opium, as charged in the Fourth Count of said Indictment; and as a punishment therefor your petitioner was ordered to pay a fine of Two Hundred Dollars (\$200.00) and to be imprisoned in the County Jail of the County of Alameda, State of California, for a period of one year.

[20]

That your petitioner claims a writ of error against said judgment from the United States Circuit Court of Appeals for the Ninth Circuit, and in that behalf avers that there is a manifest error in said Indictment and in the verdict upon which the same was based, and as set out in the Assignment of Errors filed herewith.

WHEREFORE, your petitioner prays that he be allowed herein a Writ of Error upon said judgment rendered against him from the United States Circuit Court of Appeals for the Ninth Circuit to the said District Court of the United States, in and for the Northern District of California, First Division; that he be awarded a supersedeas upon said judgment and all necessary process, including bail.

FRANK R. SWEASEY,
CARL E. LINDSAY,
Attorneys for Petitioner.

ORDER ALLOWING WRIT.

The foregoing petitioner for a Writ of Error is granted; the Writ of Error and the supersedeas therein prayed for pending the decision upon the Writ of Error are allowed, and the defendant ROBERT DONALDSON is admitted to bail upon the Writ of Error in the sum of \$2000.00.

The Bond for costs upon the Writ of Error is hereby fixed at the sum of \$100.00.

JOHN J. DE HAVEN,
United States District Judge.

[Endorsed]: Filed Dec. 5, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5137.

UNITED STATES

vs.

HENRY GALLAGHER and ROBERT DONALD-
SON,

Defendants.

Assignment of Errors.

Of October Term, in the Year of our Lord One
Thousand Nine Hundred and Twelve.

Afterwards, to wit, on the 5th day of December, A.
D. 1912, in the same Term, before the Justice of the
United States Circuit Court of Appeals for the
Ninth Circuit, at the City and County of San Fran-
cisco, in the State and Northern District of Califor-
nia, comes the said Robert Donaldson, by Messrs.
Frank R. Sweasey and Carl E. Lindsay, his counsel,
and says: That in the record and proceedings in the
action of United States vs. Robert Donaldson, No.
5137, in the District Court of the United States, in
and for the Northern District of California, First
Division, there is manifest error in this, to wit:

1. That the said District Court committed mani-
fest error in overruling the objection of the Attorneys
for the defendant **ROBERT DONALDSON** to the
question put by the United States Attorney to the
witness David G. Powers, as follows: [22]

“Mr. McNAB.—Q. Mr. Tidwell never spoke to
you about this matter until he sent for you after he

seized these letters that had gone out from the jail which disclosed Mr. Donaldson's connection, did he?"

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

2. That the said District Court committed manifest error in overruling the objection of the Attorneys for the defendant ROBERT DONALDSON to the question put by the United States Attorney to the witness David G. Powers, as follows:

"Mr. McNAB.—Q. And it was only after he had this positive information in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?"

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

3. That the said District Court committed manifest error in refusing to give the following Instruction (No. 11) requested by the defendant ROBERT DONALDSON, viz.:

"In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it.

"Generally a conspiracy, such as charged here,

must have its formation stage, its period of organization, its [23] preparatory steps to preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and until some act has been done to effect the purpose—some overt act—the crime has not been complete, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

4. That the said District Court committed manifest error in refusing to give the following instruction (No. 12) requested by the defendant ROBERT DONALDSON, viz.:

“I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and that it was in furtherance of such fully completed conspiracy, and not a part of [24]

it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination."

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

5. That the said District Court committed manifest error in refusing to give the following Instruction (No. 10) requested by the defendant ROBERT DONALDSON, viz.:

"In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely, that at a certain time and place, he did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer 'Siberia,' and that at a certain time and place he did propose to said David G. Powers and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship 'Siberia' in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

"You must determine from the evidence, first, whether such acts or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were ac-

tually [25] committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof."

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

6. That the said District Court committed manifest error in refusing to give the following Instruction (No. 13) requested by the defendant ROBERT DONALDSON, viz.:

"Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be considered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant [26] Donaldson it must clearly appear from the evidence that

they were co-conspirators as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond a reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

7. That the said District Court committed manifest error in giving to the jury the following charge, viz.:

“When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all and is binding upon all,—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any one of these parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on the trial before you.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

8. That the said District Court committed manifest error in giving to the jury the following charges, viz.: [27]

“You are instructed that it is not necessary that the conspiracy should be successful in order that the

defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged."

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

9. That said District Court committed manifest error in giving to the jury the following charge, viz.:

"If upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the Second Count or in the actual concealment of the opium alleged in the Fourth Count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant."

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

10. That the said District Court committed manifest error in denying, refusing and overruling the defendant's motion for a new trial herein.

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law. [28]

11. That the said District Court committed mani-

fest error in denying, refusing and overruling the defendant's motion in arrest of judgment herein.

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

12. That the said District Court committed manifest error in sentencing the defendant ROBERT DONALDSON to imprisonment in the County Jail of the County of Alameda, State of California, for a period of one year and imposing upon him a fine of Two Hundred Dollars (\$200.00).

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

13. That the defendant ROBERT DONALDSON was not convicted herein by due process of law; all of which is to the great prejudice, damage and injury to his substantial rights.

14. That the verdict of the jury herein upon which the judgment against the defendant ROBERT DONALDSON was based is contrary to law and contrary to the evidence adduced at the trial of said ROBERT DONALDSON.

All of which is to the great prejudice, damage and injury to the substantial rights of said defendant ROBERT DONALDSON.

15. That the evidence adduced at the trial of the said defendant ROBERT DONALDSON herein was insufficient to support the said verdict of conviction or the said judgment [29] so rendered upon said verdict of conviction.

All of which is to the great prejudice, damage and

injury of the said petitioner and in violation of the rights conferred upon him by law.

16. That the evidence adduced at the trial of said defendant ROBERT DONALDSON on which the verdict of conviction against him was rendered and the judgment of conviction based consisted entirely of the testimony of accomplices, and by reason thereof the said District Court committed manifest error in refusing to give the following Instruction (No. 19) requested by the said defendant ROBERT DONALDSON, viz.:

“I charge you that the testimony of a co-conspirator or an accomplice ought to be viewed with distrust. You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. When it is supported in material respects you are bound to credit it, but where it is uncorroborated, you are not to rely upon it, unless after the exercise of extreme caution it produces in your minds the most positive conviction of its truth.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

WHEREAS, by the law of the land, said judgment ought to be given for said ROBERT DONALDSON, plaintiff in error, and against the UNITED STATES, defendant in error, and the said plaintiff in error, ROBERT DONALDSON, prays the judgment [30] to be reversed, annulled, and altogether held for nothing, and that he be restored to

all things which he hath lost by occasion of the said judgment.

FRANK R. SWEASEY,
CARL E. LINDSAY,

Attorneys for Said Defendant Robert Donaldson.

[Endorsed]: Filed Dec. 5, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5,137.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT DONALDSON,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 25th day of November, 1912, the above-entitled cause came on for trial before the above-entitled Court and a jury duly impaneled.

Hon. J. J. DE HAVEN Presiding. The plaintiff appearing by JOHN L. McNAB, United States Attorney, and BENJAMIN McKINLEY, Assistant United States Attorney, and the defendant appearing by FRANK R. SWEASEY and CARL E. LINDSAY; whereupon the following proceedings were had: [32]

[Testimony.]**[Testimony of David G. Powers, for the United States.]**

DAVID G. POWERS, called for the United States, sworn.

Direct Examination.

(By Mr. McNAB.)

Q. How old are you?

A. Twenty-five years, the day I was sentenced.

Q. Where do you live?

A. I live on London Street, between Brazil and Persia.

Q. How long a period of time did you serve in jail for the offense of obtaining and bringing in this opium? A. I served five months.

Q. Five months? A. Yes, sir.

Q. That was the period of six months less your credits for good behavior? A. Yes, sir.

Q. Do you know the defendant Donaldson?

A. Yes, sir.

Q. How long have you known him?

A. I have known him, I guess, for about—just before the fire, but not to talk to him; I have known him since the fire to talk to him.

Q. You know Henry Gallagher, the Customs Inspector? A. Very well.

Q. You and he are personal friends?

A. Yes, sir.

Q. What was your position during December, 1911, what were you doing?

(Testimony of David G. Powers.)

A. I was assistant to the superintendent of the Western Fuel Company.

Q. And what was your business on the waterfront?

A. I had charge of the Western Fuel discharging and loading ships with coal, and I had charge, superintended all the outside work, and charge of all this work, barge work and everything.

Q. What was Mr. Donaldson's position on board the steamships?

A. Mr. Donaldson was the assistant superintendent of the marine superintendent of the Pacific Mail Steamship Company.

Q. Had you seen him frequently prior to the time this controversy [33] came up? A. Yes, sir.

Q. Were you thrown in contact with him frequently in the ships? A. Yes, sir.

Q. During the month of December, 1911, did you have a conversation with Mr. Donaldson relative to the opium business? A. Yes, sir.

Q. Just briefly state to the jury what the conversation was.

A. Last December Mr. Donaldson approached me. I was over at Pier 42. I used to go over there quite frequently to find out from the assistant superintendent Donaldson when ships would be breasted off so we could put barges to them and discharge the coal. I met Mr. Donaldson, and Mr. Donaldson spoke to me very nicely, and he said: "Why don't you go into the hop business, Dave?" I says: "I don't care to go into that." "Gee," he says, "Look at the money that Hugh made and several others have made in the

(Testimony of David G. Powers.)

hop business." And he said, "You are foolish." Of course, I had my own troubles at that time. I consented afterwards; first, I refused, and then consented afterwards.

Q. What did you understand by the "hop business"? A. The opium business.

Q. Is that what the opium, the traffic in opium is commonly called on the waterfront?

A. Yes, sir. And he said that there were six hundred cans aboard the "Siberia," he said that over at Pier 44; so we walked over and went aboard the "Siberia," and Mr. Donaldson introduced me to Wong Tai, who was there.

Q. Do you recognize that as the Chinaman? (Indicating.)

A. Yes, sir. We went into the chief engineer's room, and Mr. Donaldson called the chief engineer's boy and the boatswain.

Q. When you say the chief engineer's boy, is that the China boy? A. Yes, sir.

Q. And the boatswain? A. Yes, sir. [34]

Q. All right, go ahead.

A. The conversation—we walked into the room that morning, I guess it was about 9 or 10 o'clock; I am not sure. The Chinaman says: "How much got left?" Mr. Donaldson said that. The Chinaman says: "Only three hundred sixty cans left." He says, "The Customs Inspector took the rest off last evening." And Mr. Donaldson says: "Will you get the rest off?" He says: "Let the inspector take the rest off; I want five dollars." He says: "You can

(Testimony of David G. Powers.)

have five dollars." And of that we were to get a quarter each on that because twenty-five per cent of it, he said, "Bill has to get."

Q. He didn't say who Bill was?

A. No, sir. Mr. Donaldson made the arrangements. He asked me at that time when I could take it. The barge "Melrose" was alongside, and I being employed with the Western Fuel Company for eleven years I knew just about to the hour how long it would take to discharge a barge.

Q. What did Mr. Donaldson say then as to who else, if anybody, had to share in the profits of this venture?

A. He told me that Mr. Gallagher would be—

Q. What Mr. Gallagher did he tell you?

A. Henry Gallagher.

Q. Had he known you and Henry Gallagher were friends?

A. I guess he must have known it. He told me to take Mr. Gallagher along with me, that everything was all right.

Q. What did he say about the division that had to be made between you?

A. The division was to be one-quarter—I was to get twenty-five per cent.

Q. Where was the other to go?

A. He said I had to have someone to help me—I said that; and he said it was a quarter to himself and a quarter to Mr. Gallagher; and that left one-half for Mr. Fiedler and I. I knew at that time I couldn't handle it by myself.

(Testimony of David G. Powers.)

Q. You knew you had to have somebody?

A. Yes, sir. [35] We had arranged to get it off the night before the barge was discharged—I should say, after the barge was discharged; and the night before the barge was discharged I went off the ship and I met Fiedler on the barge “Melrose” and I discussed with him about it at the time, and when I first spoke about it to Fiedler he refused, and then I urged him and he consented.

Q. What did you do finally?

A. Next day I went back to the boatswain’s room and we met the boatswain and the engineer’s boy again; and while we were in conversation with the boatswain and the chief engineer’s boy the name of Donaldson was brought up several times, as Mr. Fielder demanded to know who was dividing the money.

Q. What did you tell Mr. Fiedler as to how the money was to be divided?

A. It was divided in to four equal parts, to Mr. Donaldson, to Mr. Fiedler, Mr. Gallagher and I.

Q. How many cans of opium did you understand were to be brought over at first?

A. Three hundred sixty cans.

Q. Three hundred and sixty cans? A. Yes, sir.

Q. With whom did you leave the arrangements as to notifying the Chinaman? A. Mr. Donaldson.

Q. Did you have any further arrangements with Mr. Fiedler about the time of going over to the ship, or did you leave that to him?

A. That arrangement was made at the time we

(Testimony of David G. Powers.)

were in the room; and then afterwards Mr. Fiedler met the Chinaman again.

Q. Did Mr. Donaldson tell you where this opium was to go? A. He gave me the address.

Q. Where?

A. Wong Hugh, Seventh and Harrison, Oakland.

Q. Seventh and Harrison, Oakland?

A. Yes, sir.

Q. Had you ever heard of Wong Hugh before?

A. No, sir.

Q. Had you ever heard of him from anybody except Mr. Donaldson? [36]

A. No, sir, not before; but afterwards I heard about him when I was serving my sentence.

Q. Did you ever go back or did you board the "Siberia" to see the Chinaman in regard to the opium?

A. After that, no, I never spoke to them about it—yes, I did, I beg pardon. Next day, I did not go back to see him, but the Chinaman next day told me a day or so afterwards if I was on the barge, that the opium had been lowered over the sides and that there were three hundred and sixty cans.

Q. How many conversations did you have aboard the "Siberia" with the Chinaman?

A. One with Mr. Donaldson and one with Mr. Fiedler; and then there was one after.

Q. When did you next talk to Mr. Donaldson about the next step in the arrangement?

A. After the opium was off, I told Mr. Donaldson the opium was aboard the barge.

(Testimony of David G. Powers.)

Q. What arrangements, if any, were made as to where the opium was to be met?

A. It was to be met at Webster Street Bridge, Oakland.

Q. I mean in San Francisco?

A. Mr. Donaldson afterwards went over to Pier 42 and rang up a Chinaman, Soon Key.

Q. Were you present at the time he telephoned?

A. Yes, sir; in a little booth at Pier 42.

Q. What arrangements did he make with the Chinaman?

A. He made them for the Chinaman to meet me at First and Folsom.

Q. At First and Folsom? A. Yes, sir.

Q. Did you afterwards meet the Chinaman there?

A. Yes, sir.

Q. Was anybody—was there anybody present with him? A. No, he was alone.

Q. Did Mr. Donaldson meet you that evening?

A. Yes, sir. I forget just what time, but it was early. [37]

Q. Where did you next have anything to do with the opium?

A. After I had left the Chinaman, he told me he wouldn't go along with us but everything was all right, had been arranged; and I went down to Mission down by the front—I forget just the name of the street, and I met Mr. Gallagher; he was standing on one corner and Mr. Fiedler on the other.

Q. Where did you go?

A. Directly to the barge "Melrose" at Mission

(Testimony of David G. Powers.)

street, we went aboard the barge; and it seems that Mr. Fiedler didn't go aboard the barge, he wanted to get something to eat and he went for that, and Mr. Gallagher and I went on the barge and Mr. Fiedler came down afterwards.

Q. What did you do with the opium?

A. Mr. Gallagher kept watch while Mr. Fiedler and I lowered the opium over the side of the boat into the skiff or rowboat; and Mr. Fiedler rowed the boat over to Crowley's boat-house, Oakland; and Mr. Gallagher and I took the nickel ferry, the Creek Route and went over to Oakland.

Q. Before Mr. Fiedler left you what was the understanding between yourself, Mr. Gallagher and Mr. Fielder as to what Mr. Fiedler was to do?

A. He was to take us aboard the barge "Melrose."

Q. After you left the "Melrose"?

A. He was to go to Webster Street Bridge.

Q. At Oakland? A. Yes, sir.

Q. And when Mr. Fielder went off for Crowley's boat-house, Oakland, where did you and Mr. Gallagher go? A. The nickel ferry.

Q. Where did you go from there?

A. Right straight over to Oakland.

Q. Who arrived in Oakland first?

A. Mr. Fiedler.

Q. Mr. Fiedler? A. Yes, sir.

Q. Was he waiting for you when you arrived there? A. Yes, sir.

Q. Have the opium with him?

A. Yes, sir, it was in the boat. [38]

(Testimony of David G. Powers.)

Q. Just tell what took place after you arrived in Oakland.

A. We arrived in Oakland and waited quite a while for Wong Hugh but he didn't show up.

Q. By the way, you say that Mr. Wong Hugh didn't *say* up; what was the arrangement with regard to Wong Hugh?

A. Wong Hugh or someone representing him was to meet us and take the stuff.

Q. Who informed you that that arrangement was made?

A. Mr. Donaldson, and also the Chinaman that met us.

Q. The Chinaman that met you at First and Folsom? A. Yes, sir.

Q. Tell us what took place.

A. We arrived at the Webster Street Bridge and waited quite a while for the Chinaman to show up, but no Chinaman showed up; and I went over to Mrs. Wong Hugh's house, and Mrs. Wong Hugh would not let me in; so I went down and rang up this Chinaman who had met me at First and Folsom, I rang him up over the Home phone; and he said he would come over, but one of his children was sick but that he would come over. This Chinaman came over and met me at Seventh and Broadway, and then we went down to see Mrs. Wong Hugh and Mrs. Wong Hugh allowed us to come in when he talked Chinese to her. It was next door to some Chinese Native Sons or something like that.

Q. Did this Chinaman that met you at Seventh and

(Testimony of David G. Powers.)

Broadway go with you? A. Yes, sir.

Q. He did the talking?

A. Yes, sir. Then Mrs. Wong Hugh rang up for her son, and he didn't come. I knew I had lots to attend to the next morning and it was getting late and I told her that; and she said: "Here is five dollars; go down and get an automobile and bring the stuff up to the house." So I turned around and took the five dollars and went back to where Gallagher and Fiedler had been; and it seems that Mr. Fiedler had—

Mr. LINDSAY.—We object to that, the witness is giving his own [39] conclusion and opinion as to what may have happened.

The WITNESS.—No, sir, I'm not. I am telling you what I was told.

Mr. McNAB.—Q. Was Mr. Gallagher there when you got back? A. He was not there.

Q. Well, your knowledge as to why he had left is what the attorney is objecting to. At any rate, he was not there? A. No, sir.

Q. Mr. Fiedler was there? A. Yes.

Q. What did you and Mr. Fiedler do?

A. Mr. Fiedler and I then walked up to the saloon; I told him about everything. I says: "What has become of that fellow? He has cold feet." And I said that I had the five dollars from Mrs. Wong Hugh that I would ring up a taxicab or automobile and have the opium taken out to Mrs. Wong Hugh's residence. We went to the saloon, and there were some men there and a policeman or two, and we didn't

(Testimony of David G. Powers.)

want to ring up while they were in the saloon; and we walked back and Mr. Fiedler got impatient.

Q. In the meanwhile, where had you left the opium?

A. Still under the dock at the Webster Street Bridge.

Q. Was it dark?

A. Yes, sir, very dark. So Mr. Fiedler and I walked back. Mr. Fiedler got impatient and got a satchel of opium and started out, and I after him, and we were arrested.

Q. You say you were sentenced to six months in the county jail? A. Yes, sir.

Q. Mr. Fiedler got the same? A. Yes, sir.

Q. After you were in the county jail did Mr. Donaldson come to see you? A. Yes, sir.

Q. Before you served your sentence were you admitted to bail? A. Yes, sir. [40]

Q. Did Mr. Donaldson have any conversation with you during that period of time relative to whether or not you should talk?

A. Yes, sir. The first time I met Mr. Donaldson after I had been released from jail. I went to him and asked him about Mr. Fiedler's release. Mr. Donaldson said he didn't want to show his hand. I told him my father was willing to go half of the bail for Mr. Fiedler. Mr. Donaldson would not show his hand, he said.

Q. Did he make any promise to you at that time as to what he would do for you?

A. Yes, sir. He came to me and offered to give

(Testimony of David G. Powers.)

me a thousand dollars and would do everything for me. I told him I didn't want him to give me that, but to have him treat me decent when I got out of jail.

Q. About how often did he come to see you?

A. First time he came to see me—I was sentenced on the 3d of February, and he came to see me a week from the following Sunday.

Q. About how many times did he come all together?

A. He came every other week while I was in jail up to a few weeks before I went away.

Q. Was Mr. Fiedler in jail during that time?

A. Yes, sir.

Q. Did you and he have any conversations or intercourse during that time?

A. We met every day—we were both trustees after a week or so.

Q. Trustees? A. Yes, sir.

Q. Were you and Mr. Fiedler friendly during the time you were in jail? A. Yes, sir.

Q. I understand certain letters were written by Mr. Fiedler in jail? A. Yes, sir.

Q. That is the way in which your connection with these people was learned? A. Yes, sir.

Q. You were subsequently brought before the grand jury because of [41] those facts and brought face to face with them?

Mr. LINDSAY.—We object to that on the ground that it is irrelevant, incompetent and immaterial, not the best evidence, and the question calls for an act or declaration of one co-conspirator to the conspiracy.

(Testimony of David G. Powers.)

Mr. McNAB.—Withdraw the question. Take the witness.

Cross-examination.

(By Mr. LINDSAY.)

Q. How long had you been in the employ of the Western Fuel Company before December, 1911?

A. Around 10 and 11 years.

Q. At the time concerning which you have testified, namely, December, 1911, you were a sort of foreman of that institution?

A. I was considered assistant to the superintendent. I had charge of all the outside work. I was a foreman.

Q. Among your duties, as I understand your testimony, was that of superintending the loading of coal into these various ships? A. Yes, sir.

Q. And you had under you men who were in charge of certain barges?

A. And gangs; yes, sir.

Q. What is that? A. And working gangs also.

Q. And working gangs? A. Yes, sir.

Q. You did not yourself have direct control or charge of any particular barge, did you?

A. No, sir.

Q. This man Fiedler— A. Fiedler?

Q. What was his position?

A. He was captain of the barge, barge "Wellington."

Q. Captain of the barge? A. Yes, sir.

Q. He was under your control and direction?

A. Yes, sir.

(Testimony of David G. Powers.)

Q. What barge was he the captain of?

A. "Wellington," the barge [42] "Wellington."

Q. The barge "Wellington." Well, how long had you known Fiedler?

A. I have known Fiedler, I should judge, 5 years, or 4 years.

Q. Were you quite friendly with him at that time?

A. I have been friendly with all the men that have been working for me.

Q. I am talking particularly about Fiedler.

A. Yes, sir, I have been friendly with all the men working under me.

Q. And that includes Fiedler?

A. Yes, sir, all of them.

Q. He was that time captain of the barge "Wellington"? A. Yes, sir.

Q. Was the barge "Wellington" used at that time in carrying coal to the ship "Siberia"?

A. It had been used but not at that time.

Q. I am talking about that time. A. No, sir.

Q. This barge you speak of which was used by you in the transportation of this opium, what was the name of that barge? A. Barge "Melrose."

Q. "Melrose"? A. Yes, sir.

Q. Had the barge "Melrose" been in use in carrying coal to the ship "Siberia"? A. Yes, sir.

Q. Who was the captain of the barge "Melrose"?

A. His name was Christenson; I don't know his first name.

Q. Did you have Mr. Fiedler transferred from the

(Testimony of David G. Powers.)

barge "Wellington" to the barge "Melrose"?

A. No, sir.

Q. Well, he was so transferred, was he not?

A. No, sir, he wasn't transferred.

Q. How was it that Mr. Fiedler had control of the barge "Melrose" at the time you took this opium off this ship?

A. Fiedler did not have control of it. He just went aboard that evening received the opium while the other bargemen were uptown, perhaps going to the theatre or something of the kind.

Q. Who was in charge of the barge at the time?

A. Nobody at that [43] time but the captain and men supposed to be in control.

Q. Where was he?

A. Uptown, I presume, going to the theatre or meeting some friends, I presume.

Q. Wasn't somebody supposed to be on that barge at that time? A. Not according to my orders.

Q. According to your orders the barge might lie there unattended?

A. Yes, sir. I believe in men going out for a little recreation. I don't believe in men working day and night.

Q. That is true, you have told us that; and that is the reason for that barge being unattended by anyone at that time? A. Yes, sir.

Q. That is the only one? A. The only reason.

Q. Is it not a matter of fact that you told the men who were in that barge or on that barge to leave?

A. No, sir.

(Testimony of David G. Powers.)

Q. Gave them express permission to go away?

A. No, sir. I have always told every man on every job that I have ever had yet that when his day's work was done he could go uptown and go wherever he cared to go.

Q. I am talking about that particular job.

A. No, sir.

Q. On that particular job on that particular evening, did you not give the men particular permission to leave the barge? A. No, sir, I did not.

Q. How did you know that the barge was unattended?

A. I have been down there so long I know the business. I know very well the men go out every evening, I know how long they work.

Q. Did you know at that time there was actually nobody on there?

A. No, sir. That was the only barge alongside the "Siberia" and the only barge we could depend to put the opium on.

Q. And when you and Gallagher and Fiedler went there and went aboard that barge—

A. (Interrupting.) Gallagher did not go aboard that [44] barge.

Q. Then I misunderstood you. I thought you said you and Gallagher went aboard the barge, and Fiedler went some place to get something to eat.

A. No, sir.

Q. Correct that.

A. I said that Gallagher, after the opium had been placed aboard the barge, went down on Mission

(Testimony of David G. Powers.)

Street, and then I went aboard the barge, and Gallagher. Mr. Fiedler then went to Oakland. The barge was at Pier 42.

Q. After it had been towed? A. Yes, sir.

Q. Did you give orders that the barge be towed to Pier 44?

A. The barge was alongside Pier 44, alongside the steamer.

Q. The steamer "Siberia"? A. Yes, sir.

Q. Was Mr. Gallagher aboard the barge during the time she was lying alongside the "Siberia"?

A. No, he was not, to my knowledge.

Q. When he was aboard the barge it was at some other position? A. Yes, sir.

Q. What position?

A. Mission Street Wharf, alongside the bunkers.

Q. How did it get there? A. Towed by a tug.

Q. How did it get there?

A. Under orders from the "Melrose."

Q. Who was captain of the barge at that time?

A. Mr. Christenson.

Q. At that time the opium was aboard the barge?

A. Yes, sir.

Q. How long have you known this boatswain?

A. In my business I met all the boatswains. I have met him from time to time, I guess, in the last 10 years. Really, I don't remember how long I have known him.

Q. In December, 1911, at the time you say you were introduced to him by the defendant, Donaldson, you were very well acquainted with the boatswain, were you not?

(Testimony of David G. Powers.)

A. No. The Chinamen looked alike to me. At that time I knew who he was but didn't know his name. [45]

Q. Do I understand you as wishing to say that at the time you speak of you were not acquainted with this boatswain?

A. I would say I knew the man, perhaps, to say, "Hello," to him.

Q. You did know him?

A. I explained to you, in that way.

Q. You knew him from the other Chinamen?

A. No, sir.

Q. You knew his name? A. No, sir.

Q. You knew he was the boatswain of the "Siberia"?

A. Certainly, anybody could see that that saw him.

Q. Your duties were such as would call you aboard the ship frequently? A. Yes, sir.

Q. And had been on the "Siberia" many times before? A. Yes, sir.

Q. Many times you had seen this boatswain on board that ship? A. Yes, sir.

Q. And you knew perfectly well he was the chief boatswain of the "Siberia," didn't you?

A. Certainly.

Q. And many times you had spoken to him before that?

Mr. McNAB.—We object to that on the ground that it has been gone over three or four times. I do not desire to interrupt, but I think we might make a little better speed.

(Testimony of David G. Powers.)

Mr. LINDSAY.—Well, I am through with that part of it.

Q. Had you ever met the engineer's cabin boy before the time you speak of?

A. I don't know the engineer's cabin boy. What do you mean—the chief engineer's boy? No, I never seen him.

Q. Never saw him before? A. No, sir.

Q. You have known Mr. Donaldson since the fire?

A. Yes, sir. I knew him by sight before, after the fire I came to talk to him.

Q. Up to the time of this trouble when you were arrested and sentenced to jail, had he and you always been friends?

A. Well, we would pass one another on different occasions and I would say, "Good [46] morning,"—just passing by.

Q. No particular friendship between you?

A. No, sir; no particular friendship between us in any way.

Q. He was assistant superintendent for the steamship?

A. For the Pacific Mail Steamship Company; yes, sir.

Q. At the time of this conversation of which you have spoken, you were not particularly intimate with him?

A. No, sir; just would pass me by, and we would just stop and talk a few minutes on a business proposition; that is all.

Q. Could you fix about the date when you had this

(Testimony of David G. Powers.)

conversation with him on the pier you speak of—
Pier 42, I think?

A. I think that was about, if I am not mistaken, on Saturday morning, in December; I don't remember the date. I won't say the date because I don't remember; but the ship, I think, arrived on Friday afternoon or Friday morning, and I think Mr. Donaldson met me on Saturday morning, I believe, or on a Sunday morning—I believe it was on Sunday morning, for we were working the "Siberia," that Mr. Fiedler and I, if I am not entirely mistaken, met the boatswain and chief engineer's boy.

Q. Sunday morning? A. Yes, sir.

Q. If the "Siberia" came in on Friday you probably met Donaldson, as you say, the next day?

A. Yes, sir.

Q. And the following day you and Fiedler met the boatswain? A. Yes, sir.

Q. It was a fact, as I understand you, that on Sunday, or at any rate on a day subsequent to this talk with Mr. Donaldson, you and Mr. Fiedler alone met the boatswain?

A. Yes, sir, we met them afterwards.

Q. And had a talk with him? A. Yes, sir. [47]

Q. Mr. Donaldson wasn't there at that time?

A. No, sir.

Q. When were you sentenced to be imprisoned in the County Jail?

A. My birthday; that was February 3d.

Q. Were you tried, or did you plead guilty?

A. I plead guilty.

(Testimony of David G. Powers.)

Q. At that time, what were your feelings towards Mr. Donaldson? A. Very friendly.

Q. Very friendly? A. Yes, sir.

Q. I understood you that before this conversation on Pier 42 you had merely a bowing acquaintance with him, is that correct?

A. Friendly acquaintance, certainly.

Q. Then after you had this talk about the smuggling, and these events happened, and you were sentenced to jail, went to jail, then your feelings were very friendly?

A. He had been in with me, and I thought Donaldson was made of the same stuff as I was; but I found out later he wasn't.

Q. You thought he was made of the same stuff you were, but you found out later he wasn't?

A. Yes, sir.

Mr. McNAB.—Q. What do you mean by that?

A. I mean that I thought Mr. Donaldson was a friend of mine on account of being in with me, and afterwards turned around and had no use for me.

The COURT.—Instead of going into these details, the real question here is: What are the feelings of the witness at the present time, not what they were; that doesn't make so much difference about that. The question is: What are they now?

Mr. LINDSAY.—Q. What are your feelings toward Mr. Donaldson now? A. Friendly.

Q. Friendly at this time? A. Yes, sir.

Q. I thought you said your feelings toward him had changed? A. Not to a great extent. [48]

(Testimony of David G. Powers.)

Q. During the time that you were in jail you knew, then, did you, as well as you know now, that Donaldson had first suggested this matter to you?

A. Certainly.

Q. When did you first speak of this to anyone?

A. Speak of which?

Q. Of Mr. Donaldson's complicity of this matter you have said.

A. I spoke of it at the time Mr. Fiedler and I—when I met Mr. Fiedler and I asked him to go into the opium business with me, it was the next day.

Q. After your conversation, when did you first tell anyone that Mr. Donaldson was interested in this matter? A. I have told Mr. Tidwell.

Q. Who is Mr. Tidwell?

A. United States Special Agent, I think treasury agent.

Q. Was that before or after you got out of jail?

A. That was after I got out of jail.

Q. Where did you tell him, in what place?

A. In the Custom-house.

Q. Did you go to him or did he come to you?

A. I went to him.

Q. You went to him? A. Yes, sir.

Q. And you told him this story you told here, did you? A. Yes, sir.

Q. What is your business now? A. Nothing.

Q. Have you been in the employ of the Government in any capacity since you came out of jail?

A. Yes.

Q. What capacity? A. As custom's agent.

(Testimony of David G. Powers.)

Q. Are you a custom's agent now? A. No, sir.

Q. When did you cease to be a custom's agent?

A. The other day.

Q. What day? A. Saturday.

Q. Last Saturday? A. Yes, sir.

Q. When do you expect to be a custom's agent again?

A. I do not expect to be a custom's agent again.

[49]

Q. When were you appointed custom's agent?

A. I don't remember the date.

Q. By whom?

A. By the Treasury Department at Washington.

Q. Mr. Tidwell, did he have anything to do with it? A. Something; yes, sir.

Q. On his recommendation? A. Yes, sir.

Q. Was it before or after you told Mr. Tidwell this story about Mr. Donaldson? A. It was before.

Q. You went to Mr. Tidwell and you told him what you have told here and afterwards were appointed custom's agent? A. Yes, sir.

Q. You say Mr. Donaldson came to see you while you were in prison in the County Jail at Alameda?

A. Yes.

Q. Before his first visit to you had you communicated with him in any way?

A. Mr. Donaldson came over to me the first time after I had been in jail.

Q. Before he came had you written to him?

A. No, sir.

Q. Did you write to him at all?

(Testimony of David G. Powers.)

A. I did write to him under his suggestion, but Mr. Donaldson dictated that letter—you have it there—so he wouldn't have to show his hand.

Q. I will ask you: While you were in the County Jail, while you were imprisoned in that County Jail, you wrote this letter? Look at it.

Mr. McNAB.—We object to counsel's suggesting. I don't know what it is.

Mr. LINDSAY.—It is self-evident.

(Mr. Lindsey hands letter to witness.)

The WITNESS.—I wish you would read it, too.

Mr. LINDSAY.—Q. Is this letter in your writing?

A. I wrote it.

Q. The letter is to Mr. Donaldson.

A. I did, at his suggestion; [50] and he told me to write him as strong a letter as I could so that he wouldn't have to show his hand.

Mr. LINDSAY.—I will offer this letter in evidence.

The COURT.—Are you through with the cross-examination?

Mr. LINDSAY.—With the exception of this letter which I have introduced in evidence.

Mr. McNAB.—We offer no objection; it may be read to the jury as far as we are concerned.

The COURT.—Do you desire to read it now?

Mr. McNAB.—If you wish to ask the witness the circumstances under which it was written, I am familiar with it.

Mr. LINDSAY.—We will read it now.

(Mr. Lindsay read Defendant's Exhibit No. 1, which is as follows:)

Defendant's Exhibit No. 1.

Alameda Jail, Feb. 1912.

Mr. Robert Donaldson:

Dear Friend: I write you asking a great favor, one that I will not forget until the day I go to my grave.

It may seem foolish to you, for me to ask such a great favor which I would not do, if it was not necessary.

I want you to see if you can in any way have President William H. Taft, pardon or grant me a parole.

I have worked for eleven years for Mr. Frederick Mills of the Western Fuel Co., and have been on board the Pacific Mail Company Steamers every day they have been in port, and have never been in trouble before in my life.

I made a mistake when trouble was staring me in the face, which was the first time I even saw a can of opium. I was caught in Oakland by a police officer and on being searched found nothing on me besides the opium. I offered no resistance but walked to the patrol box with the officer. [51]

I have always been good up until this time, trying in every way to assist the custom's officers, and discharging a barge-man of the Western Fuel Co. for having opium in the barge.

Mr. Joseph Head, Mr. Joseph Wilson, Mr. James Nealon, all old employees of the United States Customs Service and Mr. Frederick Mills of the Western

(Testimony of David G. Powers.)

Fuel Company, Mr. Joseph Herald, Real Estate broker and Judge Charles Crichton of the Justices Court of San Francisco testified too my good character.

I have always helped my dad by giving him half my wages every month and tried to treat everybody nice.

I would not have been in this trouble had not other troubles been staring me in the face and I did not want to ask my old dad for assistance as he had a mortgage on his property and also had to help my sister, her husband and baby, as he has consumption and is unable to help his family very much.

I have learnt a good lesson and promise you that I will never cause anybody trouble and give you my word of honor that this is my first offense and that I done it to start a little home.

Thanking you in advance for any favors,

I remain,

Yours truly,

DAVID G. POWERS.

Redirect Examination.

(By Mr. McNAB.)

Q. Explain to the jury who made you write that letter, and under what circumstances.

Mr. LINDSAY.—We object to that as not proper redirect, and as assuming something not in evidence, and leading.

The COURT.—I will permit the question. The witness has already testified at whose suggestion he wrote it and so on.

(Testimony of David G. Powers.)

Mr. McNAB.—What were the reasons he gave you? [52]

A. Mr. Donaldson told me he wanted to help me—I told him I wanted him to help me; and he said he didn't want to show his hand, he says, "I am up against it." "Gee whiz," I says, "here I am in jail. I want to get out. I was never in jail before in my life." He says: "You write me a letter, and write and thank me for all past favors, and so forth; tell me what a fix you are in; lay it on good, and tell what a good friend I have been to you, and everything." And he said to tell the truth, write the letter, and I will show it, and do all I can for you.

Q. You informed us of that long ago?

A. Yes, sir.

Mr. LINDSAY.—I move to strike out both the question and answer.

The COURT.—Let it stand.

Mr. McNAB.—Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail which disclosed Mr. Donaldson's connection, did he?

Mr. LINDSAY.—We object to that on the grounds that it is immaterial and irrelevant, not redirect, is leading, and is based on something that is not in evidence—there is nothing here about letters being seized.

The COURT.—I will overrule the objection.

The WITNESS.—What was the question?

(Question read by Reporter.)

A. No, sir.

(Testimony of David G. Powers.)

Mr. LINDSAY.—Note our exception.

Mr. McNAB.—Q. And it was only after he had this positive information in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?

Mr. LINDSAY.—We object to that on the same grounds.

The COURT.—The objection will be overruled.

Mr. LINDSAY.—Except. [53]

A. Yes, sir.

Mr. McNAB.—Q. You said that you had been put on as a custom's agent? A. Yes, sir.

Q. You were detailed, were you not, for the purpose of trying to get on the inside of those who were smuggling? A. Yes, sir.

Q. And to use whatever information you could obtain to stop it? A. Yes, sir.

Mr. McNAB.—That's all.

Mr. LINDSAY.—Q. And I suppose you have been trying to make good in that regard, have you?

A. In every kind of way that was square and honest, not a crooked way.

Mr. LINDSAY.—That's all.

Mr. McNAB.—That's all.

[Testimony of K. E. Fiedler, for the United States.]

K. E. FIEDLER, called for the United States, sworn.

Direct Examination.

(By Mr. McKINLEY.)

Q. You reside in San Francisco?

A. Yes, sir.

(Testimony of K. E. Fiedler.)

Q. You gave your name as K. E. Fiedler. You are also known as Emil Fiedler?

A. Karl Emil Fiedler is my full name.

Q. You live in San Francisco? A. I do.

Q. What position do you occupy with the Western Fuel Company—what position did you occupy with the Western Fuel Company in the month of December, 1911? A. I was barge-keeper.

Q. Did you know the last witness who was on the stand, Mr. Powers, at that time? A. I did.

Q. Had you known him a long time before that?

A. I knew him for 4 years.

Q. Four years before that time at least?

A. I knew him since December, 1906, when I first took charge of the barge. [54]

Q. And had some business dealings with him as barge-keeper? A. Yes, sir.

Q. Did you have any conversation with Mr. Powers some time during the month of December of last year, 1911, in reference to engaging in the opium business? A. I had.

Q. Will you fix the date of that conversation?

A. I can't tell the date exactly.

Q. Well, nearly.

A. It was the first part of December; if I am right, it was about the 4th or 5th of December, before I got arrested.

Q. All right; that is close enough. State where that conversation took place and what it was.

A. Pier 44 alongside of the barge; and I approached Mr. Powers for oil, machine oil; and he

(Testimony of K. E. Fiedler.)

asked me then, he says: "Emil, will you go in the business with me?" He says: "We have a chance to make a few dollars and it looks good." So he told me what it was. I refused to go into it at first; but when he told me who was in it it looked easy to me.

Q. Did he tell you what business he wanted you to go into? A. He did.

Q. What was it? A. Opium.

Q. You say that when he told you who was in it it looked good to you. What did he tell you about that?

A. He told me at that time the money was to be divided up into four equal parts; he didn't give me the names of those who were in it at that time.

Q. That was on Pier 44? A. 44.

Q. Give us all the rest of that conversation that you can recall.

A. I said to him: "Well, Dave, I don't think I can go into it." And he talked to me; and at last I consented and says: "All right." So he said: "All right; meet me to-morrow morning and I will give you an introduction to the parties."

Q. Did he tell you on that occasion on Pier 44 just what was the work that was to be done? Did he give you particulars at that time?

A. Yes; that I had to take it off the ship and hide it in the barge. [55]

Q. He told you that? A. Yes, sir.

Q. All right. Then you made arrangements to meet him the next morning?

A. Yes, sir, I did meet him the next morning.

(Testimony of K. E. Fiedler.)

Q. State what happened then.

A. If I am right, it was on Sunday morning, and I met him during the forenoon.

Q. That first conversation was on Saturday, then?

A. I think it was on Saturday; either Saturday or Friday. I am not sure.

Q. All right. Go on; you met him on Sunday morning?

A. I met him on Sunday morning and he took me on board of the ship "Siberia," in to the chief engineer's room, where he introduced me to a man sitting there.

Q. What was his position on the "Siberia"?

A. First boatswain.

Q. That is one of the Chinese who is in the court here?

A. Yes, sir. He introduced me to the first boatswain and also to the chief engineer's boy; they were both in the chief engineer's room.

Q. There were you and Mr. Powers and the chief engineer's boy and the Chinese who is here, the boatswain, in the room?

A. Yes, sir. And the boatswain and Powers had a conversation—I was introduced—and they had a conversation which I overheard in which Mr. Donaldson's name—

Q. (Interrupting.) What was that conversation?

A. He introduced me and says: "This is the man that will get the stuff off and you can make a date with him whenever it will be ready and he will let me know and the barge will be discharged and he can

(Testimony of K. E. Fiedler.)

see you about it." So after—

Q. (Interrupting.) Hold on. You haven't told us that conversation; you said something about Donaldson's name being mentioned. Tell about that, who mentioned it.

A. I overheard the name of Donaldson and also of Henry Gallagher.

Q. Who said anything about Donaldson or Gallagher?

A. It was mentioned by Powers and the boatswain. [56]

Q. Give us that part of the conversation, if you remember it.

A. I am not positive about how it was; but from my knowledge the boatswain says: "Is Donaldson all right?"

Mr. LINDSAY.—Q. Tell what you know.

A. That was about all: "Is Donaldson all right?"

Mr. McKINLEY.—Q. Let me refresh your memory to this extent: Did you make any inquiries at that time as to who was going to divide this money?

A. I did. I inquired from Powers and he told me there were four parties.

Q. He told you that in this conversation you speak of?

A. Yes, sir; he told me, and that was at that time.

Q. What names did he give you?

A. He says: "Henry Gallagher and a man by the name of Bob Donaldson, who is assistant superintendent of the Mail Dock, and you and I; that is four.

Q. Mr. Donaldson was mentioned in that connec-

(Testimony of K. E. Fiedler.)

tion? A. In that connection.

Q. And you heard the boatswain ask if Donaldson was all right? A. I did.

Q. And Powers replied to that, did he?

A. He did.

Q. Have you given us all you can remember about that conversation?

A. Yes, sir, all. And Sunday morning—

Q. And it was arranged that arrangements were to be made whereby the boatswain was to lower that opium over the side and you were to know when it was to be done?

A. Yes, sir, I did; on Tuesday night.

Q. Was anything said about how many tins were on the ship? A. No, I never heard about that.

Q. Not in that conversation? A. No.

Q. Was any statement made in that conversation as to what the price per tin was going to be?

A. No, sir. [57]

Mr. LINDSAY.—We object to that on the grounds that it is leading and suggestive.

Mr. McKINLEY.—He answered no anyway.

Q. You left the ship after that conversation. What was the next thing that happened?

A. I went on board the ship Tuesday night; that was after Powers told me the barge would be empty about Wednesday morning.

Q. What barge was that? A. "Melrose."

Q. That was the barge you had charge of?

A. No, I had charge of the barge "Wellington," at that time it lay at anchor in the bay. I went

(Testimony of K. E. Fiedler.)

aboard the ship on Tuesday night and met the boat-swain and asked him if everything was ready. He said: "All right." The stuff was lowered over the side and I was working the rope and lowering it down in the barge and putting it in the water-tank.

Q. By the stuff you mean the opium?

A. The opium. The next day went from alongside the ship to Pier 44; laid there a day; and from there towed down to Mission Street Dock.

Q. It was there one day before it was towed to the Mission Street Dock?

A. Yes, sir, on the south side of 44.

Q. And you had that opium in an unused water-tank? A. Yes, sir.

Q. All right.

A. After the barge was down at Mission Street Dock I met Powers, also Gallagher, between Mission and Market, and was introduced to Mr. Gallagher.

Q. That is Henry Gallagher?

A. Henry Gallagher, the Custom's House man.

Q. Go on.

A. Powers and Gallagher went down on board the barge down Mission Street Dock, and I went down Market Street for my supper; after that I met Gallagher and Powers on board the barge.

Q. Aboard the barge at what time?

A. About 7 o'clock.

Q. Did you have any conversation then at that time? Go on. [58]

The COURT.—I don't think it is necessary to go into that.

(Testimony of K. E. Fiedler.)

Mr. McKINLEY.—I want the witness to go on in his own way.

The WITNESS.—I didn't have much of a conversation; just to have them say: "Hurry up; get your supper so as to get off with this." After that I went on board the barge, took a suit-case on board the barge, and met Powers and Gallagher on board the barge. Then I picked up some of the packages of opium and placed them in the suit-case. I left all three packages the way they were, packed them up, and lowered them down in the boat. Henry Gallagher stayed on the deck of the barge, Powers and I went into the hold, where I had the stuff packed, and then we lowered it in the boat, and Powers and Gallagher left me at that time and went over to the ferry, and I rowed the boat over to Crowley's boat-house and hired a launch to tow me across to Oakland. It took us about three-quarters of an hour, and arrived at Oakland at 10 minutes past 8. I waited there until Powers and Gallagher met me at the Webster Street Bridge at about half-past nine, or after nine—between nine and ten. At that time Powers told me he couldn't get the Chinaman, that he was in jail. So I says: "Well, what are we going to do?" He says: "Just wait a little while." We then had a drink together, and Powers and Gallagher left me for about ten minutes and Gallagher came back. We had the stuff concealed there under the wharf, and Gallagher stayed there a while, and I went up into Oakland. I came back about half-past

(Testimony of K. E. Fiedler.)

eleven. Gallagher was gone; and I met Powers about 12 o'clock.

Q. Gallagher was alone? A. No, he was gone.

Q. Gone?

A. He had left. I met Powers about 12 o'clock, and he told me he received five dollars to hire an automobile. We then went into a saloon; he was going to ring up for an automobile, but [59] on account of the people being in there he didn't ring up. So I got kind of leary about this, so we went and got the suit-case and took it out of the boat and after we had gone about two blocks we were held up by an officer and arrested.

Q. When was it you made your first inquiry as to who was in on the divy?

Mr. LINDSAY.—We object to that on the grounds that it is leading, suggestive.

The COURT.—The objection will be sustained.

Mr. McKINLEY.—That is all.

Cross-examination.

(By Mr. LINDSAY.)

Q. Are you acquainted with defendant, Mr. Donaldson?

A. Not personally; know him by name, that is all.

Q. Did you ever speak to him in your life?

A. I did not.

Q. At the time you had this little smuggling episode with Mr. Powers you weren't acquainted with Mr. Donaldson at all?

A. Not personally; I knew him by name, knew who he was.

(Testimony of K. E. Fiedler.)

Q. The only time you heard his name mentioned was when the Chinaman asked Powers if Donaldson was all right?

A. No, I heard Mr. Donaldson's name mentioned two or three years ago; but that was none of my business.

Q. But in connection with this affair, that was all you heard about Donaldson? A. Yes.

Mr. LINDSAY.—That's all.

Mr. McNAB.—I think we are entitled to have the jury understand the order in which these conversations took place. (Addressing the witness.) You said that is the only time the Chinaman spoke about it; what do you mean, in regard to your conversations with Powers?

Mr. LINDSAY.—We object to that—it is not re-direct, and he has not said nor testified that at any time when he talked to Mr. Powers Mr. Donaldson's name was mentioned. [60]

The COURT.—I will sustain the objection. The witness has gone into this matter very fully, and we will know no more about it if we spend a half hour on these immaterial matters.

Mr. McNAB.—Very well; we believe the jury fully understands.

Mr. LINDSAY.—We object to the District Attorney's remark.

[Testimony of Yung Tai, for the United States.]

YUNG TAI, called for the United States, sworn.

DAVID G. JONES, sworn as interpreter.

Direct Examination.

(By Mr. McNAB.)

Mr. McNAB.—This defendant is under indictment; but his counsel states that he is willing to make his statement, and I put him on the stand as such.

Mr. LINDSAY.—If there has been any preliminary understanding between the Government and counsel for this defendant, I ask as to what conditions are under which he testifies. The defendant requests that such understanding be made known if there is such an understanding.

Mr. McNAB.—There is absolutely no understanding at all. I told the attorney for this defendant that I proposed to put this defendant on the stand if he would talk; he said he is willing to go on the stand and talk; he is going to tell what he says is the truth and he is going to take the consequences. There is no understanding from me; we do not buy testimony.

Q. Your name is Yung Tai? A. Yes, sir.

Q. Were you the chief boatswain of the steamship "Siberia" in December, last? A. Yes, sir.

Q. You were the chief boatswain, were you?
A. Yes, sir.

Q. Do you know Mr. Donaldson, this man? (Indicating.)

A. I know he is assistant superintendent. [61]

Q. Did this man Donaldson in December come to

(Testimony of Yung Tai.)

you on the ship with this man Powers? (Indicating both parties mentioned.) A. Yes, sir.

Q. About what time of the day did he come to you?

A. Sunday. 1 o'clock.

Q. Is that the man? (Indicating.)

A. Yes, sir.

Q. He came to you with Mr. Donaldson, this man? (Indicating.) A. On the saloon deck.

Q. What did they say to you on the saloon deck?

A. They came over on Sunday, the second superintendent and the coalman.

Q. By the second superintendent do you mean this man Donaldson sitting here? (Indicating.)

A. Yes, sir.

Q. By the coalman, do you mean this man that just rose up, Mr. Powers? (Indicating.) A. Yes.

Q. Just tell what they said.

A. The chief engineer's boy told me that those men had come to see me.

Q. Did Donaldson say anything to you?

A. Yes.

Q. What did he say?

A. On the saloon deck they said: "That man is a good man."

Q. What did Mr. Donaldson, the man you call the second superintendent, say to you?

Mr. LINDSAY.—I understand that is just what he answered. We object.

The COURT.—I overrule the objection.

A. He said: "That coalman is a good man."

Mr. McNAB.—Q. Did he say anything at that

(Testimony of Yung Tai.)

time about opium?

Mr. LINDSAY.—We object to that on the grounds that it is leading and suggestive.

The COURT.—The objection will be overruled.

Mr. LINDSAY.—We except.

A. Yes—to give him the opium, “He is a good man.” [62]

Mr. McNAB.—Q. Who said that?

A. The second superintendent. I don’t know his name.

Q. This man? (Indicating the defendant.)

A. Yes.

Q. What else did they say to you?

A. He says: “You give it to him; he is a good man; the second superintendent will guarantee or bail.”

Q. Tell everything that was said there.

A. I says: “I have no opium to give you.”

Q. Did they talk to any other Chinaman there at that time?

Mr. LINDSAY.—We object to that on the grounds that it is immaterial, irrelevant and incompetent and not within the issues.

The COURT.—The objection will be overruled.

Mr. LINDSAY.—Except.

A. I don’t know.

Mr. McNAB.—Q. What else took place, if anything, at that particular time? A. I went to work.

Q. While this conversation was going on, did Mr. Donaldson say anything further to you about this matter or about what was going on on the deck?

A. Yes. We were on the saloon deck, this man

(Testimony of Yung Tai.)

Donaldson and I; and he says: "Not give it to that man; give it to me."

Q. Did the coalman, Powers, and any other man come back to see you after this interview?

A. The superintendent came to see me.

Q. And what did he say to you?

A. The second time he said: "Not give it to him, give it to me—the opium." There were people then moving about and then there was no talk about opium. We were then near the stoke-hold.

Q. What did Mr. Donaldson, the man you call the second superintendent, what did he say, if anything, about where he could put the opium?

Mr. LINDSAY.—We object to that on the grounds that it is leading and suggestive. [63]

The COURT.—The objection will be overruled.

Mr. LINDSAY.—We except.

A. He told me to put 150 cans here.

Mr. McNAB.—Q. Where?

A. Inside the stoke-hold.

Q. Who told you to do that?

A. This man here, the second superintendent.

Q. You mean this man right here? (Indicating.)

A. Yes, sir.

Q. Did this man on the coal barge—Powers—come back afterwards—did these men come back to you afterwards? (Indicating.)

A. About 4 o'clock, and I told them I didn't have any; I told them I didn't have any.

Q. Now, how long after that conversation you had with Mr. Donaldson about the stoke-hold was it that

(Testimony of Yung Tai.)

Mr. Powers and Mr. Fiedler, these other two men, came back to see you? A. Came to my room.

The COURT.—I think we will suspend until 2 o'clock. Gentlemen, be here promptly at two.

November 25, 1912, Monday, 2 o'clock P. M.

The COURT.—Call the roll.

(The jury-roll was called.)

The CLERK.—All present, your Honor.

The COURT.—Proceed.

Mr. McNAB.—I don't see the witness in the courtroom.

The COURT.—Get some other.

Mr. McNAB.—That is our last witness, your Honor.

(At this stage of the proceedings, Yung Tai came into the courtroom.)

YUNG TAI, recalled.

Mr. McNAB.—Q. I simply wanted to ask you, Yung Tai: In this last conversation you had with Mr. Donaldson, or the first one, state whether or not he said anything to you about guaranteeing you [64] with the payment of any opium you turned over.

Mr. LINDSAY.—We object to that; it is leading and suggestive.

The COURT.—I overrule the objection.

Mr. LINDSAY.—We except.

A. He said: "If you give the opium to me I will guarantee you the payment."

Mr. McNAB.—Take the witness.

(Testimony of Yung Tai.)

Cross-examination.

(By Mr. LINDSAY.)

Q. How long have you been chief boatswain on the "Siberia"? A. Two years.

Q. In December, 1911, did you have opium on the "Siberia"? A. No.

Q. Did you tell Mr. Powers, the coalman, that you had any opium, would give him any opium?

A. No.

Q. Did you give him any opium? A. No.

Q. Did you tell Mr. Donaldson or anybody else that you would give them opium to take ashore?

A. No.

Q. Did you enter into any agreement with Powers or Donaldson to smuggle opium ashore?

A. They came and asked me, but I made no promises.

Q. Did you have any opium at all anywhere to let them have? A. No.

Q. You are under indictment now for smuggling, are you not?

The INTERPRETER.—He does not seem to understand the word smuggling. I will put it, "Under arrest."

Mr. McNAB.—Very well.

(The question was so put by the Interpreter.)

A. They haven't arrested me.

The INTERPRETER.—I don't know that he clearly understands the question. [65]

Mr. McNAB.—Oh yes, he is under indictment.

(Testimony of Yung Tai.)

Mr. LINDSAY.—Q. They keep you in jail now, do they not? A. Yes.

Q. What for—do you know? A. I don't know.

Q. Do you know Mr. Tudwell, who is connected with the Government service?

A. I don't know what man he is.

Q. You never saw him before?

A. Yes, I might have seen him.

Q. Did Mr. Tudwell come to see you in jail and talk to you?

A. I don't know. People did not come to see me.

Q. Did anybody come to see you in jail and talk to you about this case? A. No.

Q. Did you put any opium from the "Siberia" into the stoke-hold of the "Siberia," or on a barge alongside the "Siberia," or anywhere else? A. No.

Mr. LINDSAY.—That is all.

Mr. McNAB.—That is all. That is the Government's case, your Honor.

The COURT.—Proceed with the case for the defense.

(At this point, Mr. Sweasey asked for an instruction of the Court to bring in a verdict for the defendant upon the first and third counts of the indictment, stating his grounds for the motion. The motion was granted.)

Mr. McNAB.—If your Honor please, I forgot to prove one fact. I don't think it is essential, it has been proved, but I want to strengthen it.

The COURT.—Very well.

[Testimony of Joseph Head, for the United States.]

JOSEPH HEAD, called for the *United*, sworn.

Direct Examination. [66]

(By Mr. McNAB.)

Q. Did you bring this opium over from Oakland after it was captured? A. Yes, sir.

Q. Was it regular unstamped cans?

A. Yes, sir.

Q. Regular opium cans? A. Yes, sir.

Q. How many cans were there? A. 320.

Q. Opium that is a regular unstamped opium, prepared for smoking? A. Yes, sir.

Mr. McNAB.—That is all. That is our case.

**[Testimony of Robert Donaldson, in His Own
Behalf.]**

ROBERT DONALDSON, called in his own behalf, sworn.

Direct Examination.

(By Mr. LINDSAY.)

Q. Your name is Robert Donaldson? A. It is.

Q. Where do you live, Mr. Donaldson?

A. 829 Dolores.

Q. In this city and county? A. It is.

Q. How long have you resided here?

A. I was born here.

Q. Have you lived here all your life?

A. I have, practically, all my life.

Q. What is your business?

A. Assistant superintendent of the Pacific Mail Steamship Company.

(Testimony of Robert Donaldson.)

Q. How long have you been connected with that company? A. Since 1908.

Q. 1908? A. Yes, sir.

Q. All the time in the same capacity, assistant superintendent? A. Yes.

Q. You were employed before that in what capacities? A. As foreman for the Union Iron Works.

Q. Are you a married man? A. Yes, sir. [67]

Q. Do you know the witness who has testified here, Mr. Powers? A. Yes, I know him well.

Q. I will ask you further, during the month of December, 1911, or at any other time, you accosted him on Pier—I have forgotten the number—any pier at all, 42 or any other pier, in this city and suggested that he go with you into the business of smuggling opium? A. No, I never did.

Q. You heard his testimony here, didn't you?

A. I did; yes, sir.

Q. That you said: "What was the matter with going into such a business?" A. Yes.

Q. Did anything of that kind occur? A. No.

Q. You didn't have any such conversation?

A. None whatever.

Q. There has been some testimony here as to certain opium which was taken off the steamship "Siberia," concealed by Powers and Mr. Fiedler, and afterwards taken to Oakland and there some attempt made to dispose of it; did you have anything to do with that matter at all? A. None whatever.

Q. Did you know anything about it?

A. No, not until after it occurred.

(Testimony of Robert Donaldson.)

Q. I will ask you whether you know this boatswain who has testified here and who is now under indictment for smuggling opium?

A. Yes, I know him well.

Q. How did you become acquainted with him?

A. Seeing the man on the ship.

Q. Your business? A. Daily contact.

Q. Your business takes you on board those ships?

A. Always.

Q. What is the nature of your business?

A. Inspection and one thing and another; looking after the repair work and so forth.

Q. Is there anything connected with the nature of your duties which would render it easy for you to facilitate the unlawful landing of opium? [68]

Mr. McNAB.—We object to that on the grounds that it is immaterial and irrelevant, if your Honor please.

The COURT.—The objection will be sustained.

Mr. LINDSAY.—The witnesses have testified here as to a certain conversation which occurred on the saloon deck of the steamship "Siberia" during the month of December, 1911, in which you told this Chinaman, Yung Tai, to give the opium to Mr. Powers. Did anything of that kind occur?

A. None that I know of.

Q. You would have known of it if it had occurred, would you? A. Sure.

Q. You didn't make any such statement?

A. I did not.

Q. Did you have any reason to believe that this

(Testimony of Robert Donaldson.)

boatswain, Yung Tai, was smuggling opium or had anything to do with smuggling opium?

A. No, I had no idea.

Q. You had no idea? A. None whatever.

Q. You said you have known Mr. Powers; did his business or his duties take him aboard these various ships? A. Oh, yes.

Q. Did he have just as much opportunity as you had to become acquainted with this boatswain, Yung Tai?

Mr. McNAB.—We object to that; it is absolutely immaterial.

The COURT.—Let him answer the question.

A. Repeat the question.

(Question was read by the Reporter.)

A. That is a question; I couldn't say; he might have and he might not have. My duties would take me more within those ships in a certain way; that is, with the chief officers, than Mr. Powers' duties would.

Mr. LINDSAY.—Q. But you say Mr. Powers' duties would carry him aboard the "Siberia" and these other ships?

A. Yes, sir; it was necessary to look after all of them. [69]

Q. Mr. Powers, in the course of his testimony, stated that you telephoned in his presence to a certain Chinaman in San Francisco—I haven't the name of the Chinaman here—but you remember the testimony, do you? A. Yes, I think I do.

Q. You remember what Mr. Powers said?

(Testimony of Robert Donaldson.)

A. About telephoning? Yes.

Q. Did anything of that kind occur?

A. No, did not.

Q. The name is Sung Key?

A. I don't know the man.

Q. Do you know a Chinaman named Sung Key?

A. No, I do not.

Q. Do you know this Chinaman in Oakland whose name has been mentioned here? A. I do not.

Q. You don't know him? A. No, sir.

Q. Wong Hugh, I think his name is; do you know him? A. No, I do not.

Q. Did you ever hear of him?

A. Never heard of him.

Q. Certain letter has been read here during the cross-examination of the witness Powers?

A. Yes.

Q. You received that letter, did you?

A. I did; yes, sir.

Q. By mail? A. Yes.

Q. With reference to your visit to the County Jail of Alameda county to see Powers, was it before or after you received that letter?

A. After I received the letter.

Q. After you received it? A. Yes.

Q. Did you at any time request him to write such a letter to you? A. I did not.

Q. Did you at any time state to this Chinaman, the boatswain of the "Siberia," that if he didn't want to give the opium to Powers to give it to you and put it in the stoke-hold? A. No, I never did.

(Testimony of Robert Donaldson.)

Q. Never did? A. Never did.

Mr. LINDSAY.—You may cross-examine. [70]

Mr. McNAB.—No cross-examination. Yes, just one question.

Mr. LINDSAY.—That's all.

Cross-examination.

(By Mr. McNAB.)

Q. You did interest yourself in trying to procure a pardon for this man, did you? A. I did, yes.

Q. Was it at his request?

A. At his request, through that letter.

Mr. McNAB.—That is all.

[**Testimony of R. P. Schwerin, for the Defendant.**]

R. P. SCHWERIN, called for the defense, sworn.

Direct Examination.

(By Mr. SWEASEY.)

Q. What is your official position?

A. Vice-president and general manager of the Pacific Mail Steamship Company.

Q. You reside in the City and County of San Francisco? A. I do.

Q. You have been on the coast for some length of time? A. Yes, sir.

Q. How long? A. About 20 years.

Q. You are acquainted with the defendant, Donaldson? A. Yes, sir.

Q. How long have you been acquainted with him?

A. 1907.

Q. Will you kindly state in what way you have been acquainted with him?

(Testimony of R. P. Schwerin.)

A. He was appointed the assistant to the marine superintendent. I told Mr. Chism I wanted a man who would examine the ships.

Mr. McNAB.—We object to any personal associations; the question was—is: What was the general reputation of the defendant in the community?

The COURT.—Yes, confine yourself to that.

Mr. SWEASEY.—I understand I wouldn't be permitted to show that.

The COURT.—No. The witness can testify, if he knows, as to the general reputation of this defendant among people who know him. [71]

Mr. SWEASEY.—Very well, I will confine myself to that.

The COURT.—Just one general question.

Mr. SWEASEY.—Q. Are you acquainted with the general reputation of Mr. Donaldson for truth, honesty and integrity in this community?

A. Acquainted with it as far as it pertains to our particular business.

Q. That business, I understand, has been over a long period of time?

A. Has been over a period of five years, and has been in contact with a large number of people.

Q. What is the general reputation of Mr. Donaldson for truth, honesty and integrity and veracity in this particular—

Mr. McNAB.—(Interrupting.) I submit that is not the statutory question, and the witness has not qualified himself as a competent witness as to the general reputation of the defendant.

(Testimony of R. P. Schwerin.)

The COURT.—If a man is acquainted with a defendant, doing business with him, meets people who know the man whose character is in question, why, although it may be a limited part of the community, still we may say he knows what his general reputation is among the people with whom he moves. That is the question.

The WITNESS.—I should believe that Mr. Donaldson would have a very high opinion with the people with whom he moves.

Mr. McNAB.—Ask that the answer be stricken out as not responsive.

Mr. SWEASEY.—Q. What is his general reputation in this community for truth, honesty and integrity? A. Good, so far as I know.

Mr. McNAB.—It has not been shown that he knows.

The COURT.—I should think that a man sustaining the relations that he does to this defendant would know.

Mr. McNAB.—I withdraw the objection.

Mr. SWEASEY.—Q. What do you consider his reputation in this community? A. Excellent.
[72]

Mr. SWEASEY.—That's all.

Mr. SWEASEY.—No cross-examination.

The COURT.—That is all.

[Testimony of Arnold Foster, for the Defendant.]

ARNOLD FOSTER, called for the defense, sworn.

Direct Examination.

(By Mr. SWEASEY.)

Q. You are a resident of the city and county of San Francisco? A. I am.

Q. What is your business, please?

A. Secretary and treasurer of the Union Iron Works.

Q. How long have you been such?

A. I have been with the Union Iron Works 14 years. I have been secretary and treasurer about 4 years.

Q. Are you acquainted with Mr. Donaldson, the defendant here? A. I am.

Q. Do you know his general reputation in this community for truth, honesty and integrity?

A. I do.

Q. What is that general reputation?

A. Very good.

Mr. SWEASEY.—That is all.

Mr. McNAB.—No cross-examination. If your Honor please, I submit that in a case of this description, no matter how many character witnesses might be produced, where the Government is not concerned or concerning itself with the character of a man but with a specific act charged, there ought to be a limit put on this sort of testimony.

The COURT.—If you do not propose to go into or introduce any character evidence, I will limit it.

(Testimony of D. G. Frazier.)

Mr. McNAB.—We do not propose to go into the question of character. We consider that the one question on trial is the guilt of the defendant in this case. [73]

The COURT.—Then I will have to limit it to this one witness; in other words, you can have three witnesses; you have had two now.

Mr. LINDSAY.—I do not understand what the Government's admission is.

The COURT.—Where the Government doesn't intend to introduce contradictory evidence, I hold that three witnesses to the point is sufficient.

[Testimony of D. G. Frazier, for the Defendant.]

D. G. FRAZIER, called for the defense, sworn.

Direct Examination.

(By Mr. SWEASEY.)

Q. You are a resident of the city and county of San Francisco? A. Yes, sir.

Q. How long have you resided here?

A. About 37 years.

Q. Do you occupy any official position at the present time?

A. Yes, sir; at the present time I am a commissioner of the Board of Works.

Q. Are you acquainted with the defendant, Mr. Donaldson? A. I am, quite well.

Q. How long have you known him?

A. Well, since he was about 16 years of age. I don't know just how long that is—about 25 years, I guess.

(Testimony of D. G. Frazier.)

Q. Do you know the general reputation in this community for truth, honesty and integrity of Mr. Donaldson? A. I do.

Q. What is that reputation? A. Excellent.

Mr. SWEASEY.—That is all.

Mr. McNAB.—No cross-examination.

Mr. SWEASEY.—Your Honor, I understand you are going to limit us.

The COURT.—Yes, you are limited.

Mr. SWEASEY.—That is our case.

Mr. McNAB.—We have closed, your Honor.

(Argument of the Assistant District Attorney, Mr. McKinley, here [74] followed.)

(Argument of Mr. Lindsay, for the defendant.)

The COURT.—Gentlemen of the jury: We will take an adjournment until to-morrow morning at 10 o'clock; and now that we have continued so far with the investigation of this case, listening to the argument, I will say to you that it is your duty not to converse among yourselves or with others, if you happen to be thrown together; don't read anything that may be published in any of the papers about it, and as far as possible refrain from forming any fixed opinion until the case is finally submitted to you for decision. We will now adjourn until to-morrow morning at 10 o'clock.

[Proceedings had November 26, 1912, Concerning Statement Made by Mr. McNab During Argument.]

November 26, 1912, Tuesday, 10 o'clock A. M.

The COURT.—Call the roll of the jurors.

(The jury-roll was called.)

The CLERK.—All present, your Honor.

The COURT.—Proceed with the argument.

(Mr. McNab closed the argument for the Government.)

(During the course of Mr. McNab's argument, he made the following statement: "Letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties.")

Mr. LINDSAY.—We object to the statement just made by the District Attorney and assign it as error, the statement in which he refers to letters pouring out of the jail, which were intercepted and which fixed the guilt upon these parties; no such evidence is before [75] the jury.

Mr. McNAB.—I examined the record, if your Honor please, and had the Reporter transcribe a portion of it, from the testimony of Mr. Powers and it was just as I expected to find it—that letters had been written out of the Oakland Jail by these parties and had been intercepted, and that is how the authorities discovered the connection of these parties to this crime. I think, in order to settle the controversy, it would be better to read it into the record.

The COURT.—Yes.

Mr. McNAB.—(Reading:)

"Q. Did Mr. Donaldson have any conversation with you during that period of time relative to whether or not you should talk?

A. Yes, sir. The first time I met Mr. Donaldson after I had been released from jail; I went to him and asked him about Mr. Fiedler's release; Mr. Don-

aldson said he didn't want to show his hand; I told him my father was willing to go half of the bail for Mr. Fiedler; Mr. Donaldson would not show his hand, he said.

“Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail which disclosed Mr. Donaldson's connection, did he?” And then after an objection and the objection being overruled, the witness made the answer:

“A. No, sir.”

I think, gentlemen, that ought to dispose of that.

Mr. LINDSAY.—We still insist upon our objection, that no such letters are evidenced and that no such letters are before this jury or Court.

The COURT.—That is very true; the letters themselves are not in evidence.

Mr. McNAB.—But what they disclosed, gentlemen, is in evidence, and it stands undenied before you.

(Mr. McNab then concluded his argument.) [76]

[Instructions.]

The COURT (Orally).—Gentlemen of the jury, there are four counts in this indictment, and in order to simplify your labor in your inquiries, and also because I believe it is the law as applied to the facts of the case, you will be instructed to return a verdict of not guilty as to the first and third counts of the indictment. That will leave for your consideration only the second and fourth counts of the indictment, which, in effect, charge the defendant has been guilty of conspiracy to secrete opium unlawfully brought

into the United States.

Conspiracy is the combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. The gist of the crime of conspiracy is the unlawful agreement or combination between the parties. This refers to the second count of the indictment in which the conspiracy is charged. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy, is guilty and punishable under the law.

Ordinarily, gentlemen, in the prosecution of the offense of conspiracy, the Government has to depend upon circumstantial evidence. I do not understand that this case rests upon circumstantial evidence; it depends upon the direct evidence of the witnesses Powers, Fiedler, and the Chinaman, Young Tai.

When the fact of the conspiracy is established, it is [77] the law that the act of one conspirator is the act of all, and is binding upon all—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any one of these

parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on trial before you.

In determining the fact as to whether or not a conspiracy was actually formed to commit the offense against the United States described in the indictment, it is your duty to consider all of the facts and circumstances which have been established by the evidence. You have a right to take into consideration the relations between the parties as shown by the evidence, and all other circumstances which you believe to have been established, and apply to such facts and circumstances your own reason and common sense.

The defendant has been called as a witness in his own behalf. His testimony is before you, and you must determine how far it is credible. The deep personal interest which a defendant has in the trial and in its result should be considered by the jury in determining how far and to what extent, if at all, his testimony is worthy of credit. Of course, gentlemen, you are not to reject his testimony simply because he is the defendant; you are to weigh it fairly and impartially and consider it in the light of the other evidence, and from that determine whether or [78] not you will give it credit. If you believe the testimony of the defendant, you will, as a matter of course, return a verdict of not guilty, or, if that testimony has created in your mind any reasonable doubt as to his guilt, then it will also be your duty to return a verdict of not guilty.

You are instructed that it is not necessary that the

conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged.

The fourth count charges that the defendants Gallagher and Donaldson unlawfully, willfully, feloniously, fraudulently and knowingly received, concealed and facilitated the transportation and concealment after importation of 320 five-tael cans of opium prepared for smoking purposes, which opium had been theretofore, as the defendants well knew, imported into the United States contrary to law from some foreign port or place to the Grand Jurors unknown. It is also charged in this count that the defendants committed this offense by unlawfully, willfully, knowingly and feloniously aiding, abetting, counselling, inducing and procuring the commission of said offense by Powers and Fiedler.

With reference to these counts, gentlemen, you are instructed that if you find from the evidence to a moral [79] certainty and beyond a reasonable doubt that the defendant Donaldson aided, abetted, counselled, induced and procured Powers and Fiedler to smuggle the opium in question into the United States, or to receive, conceal or facilitate the transportation or concealment of the same after it was im-

ported, knowing it to have been imported contrary to law, and if you find that said opium was actually imported into the United States, that is, taken off the steamer "Siberia" and passed the customs lines and was captured in the city of Oakland in the possession of Powers and Fiedler, you will then be justified in finding a verdict of guilty against the defendant Donaldson, because under the laws of the United States whoever directly commits any act constituting an offense defined in the laws of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.

I am also requested to give you some further instructions.

You are charged that the burden of proof in this case, as in all other criminal prosecutions, is under the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the indictment until the facts proven are sufficient to establish his guilt. The law presumes the innocence of the defendant, and that presumption abides with him throughout the trial and until his guilt is established, and he is entitled to the benefit of that presumption throughout the trial and in all your deliberations.

It is incumbent upon the Government to prove the guilt of a defendant by evidence which satisfies the minds of the jury to a moral certainty and beyond a reasonable doubt, [80] and that by means of evidence which produces in the minds of the jury an abiding conviction of the truth of the charge and which accords with and satisfies their reason and

judgment to a moral certainty. No conviction can be had upon the evidence introduced unless the evidence is such as excludes every single reasonable hypothesis except that of the guilt of the defendant. In other words, all the facts proved must be consistent with and not only point to the guilt of the defendant, but must be inconsistent with his innocence.

I have already instructed you upon this point, but I will repeat this.

Where a defendant takes the witness-stand, his evidence is to be judged by the same tests which are applied in determining the credibility of any other witness in the case. That is, you will consider the deportment on the stand, the manner in which he gave the testimony. You will also take into consideration any motive he has for departing from the truth and weigh it precisely the same as you would when applying to it the same test as you would to that of any other witness.

Evidence as to the good character of the defendant in the community in which he lives has been introduced before you, and it is not disputed that up to the time of the bringing of this charge—that his character in the community for truth, honesty and integrity was good; you will consider that as a fact established by the evidence, and proper for your consideration in support of the presumption of innocence, and it is a circumstance which tends, in a greater or less degree, to show innocence; but how much it [81] tends to show innocence is a question for the jury to determine in the light of the view you have taken of other testimony in the case.

If, upon consideration of all the evidence to which you have listened, you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count, or in the actual concealment of the opium alleged in the third count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant.

I charge you that an accomplice may be defined to be one who is in some way concerned in the commission of a crime, and includes all persons who in any manner aid or abet or assist or participate in the criminal act.

Under this definition, the witnesses Powers and Fiedler were accomplices in the commission of an alleged crime now charged in the indictment; and if you believe the testimony of the witnesses Powers and Fiedler to be true, then the Chinaman was also an accomplice.

An accomplice is a co-conspirator.

I charge you that the testimony of a co-conspirator or accomplice should be viewed with distrust. That is, I do not mean it is your duty to reject the testimony, provided you believe it to be true, but simply you are to view it with caution, look at it with a great deal of care, and discover, if you can, whether the witness had any motive for departing from the truth; and consider also the manner in which the testimony was given, its reasonableness, its probability, and if you are satisfied beyond all reasonable doubt that those witnesses spoke the truth, then it is your [82] duty to act upon that testimony. But, if upon

the other hand, you are not satisfied of the truth of the testimony given by those witnesses, then—or, if you have any doubt on the subject, it will be your duty to return a verdict of not guilty. In other words, gentlemen, you are the exclusive judges of the credibility of the different witnesses who have testified before you, the witnesses' testimony you believe, of course you will act upon that; and if you do not believe it, reject it, and let your verdict be in accordance with your honest convictions upon the point.

I charge you that every witness is presumed to speak the truth; but that this presumption may be repelled by the manner in which a witness gives his testimony or by the character of the testimony offered, by the motives that may actuate a witness in offering his testimony, or by contradictory evidence, and any witness found by you to be wilfully false in any material part of his testimony is to be distrusted by you in other parts.

Gentlemen, with these instructions you may retire and deliberate on your verdict.

Mr. McNAB.—I understand the defendant is being tried on the second and fourth counts?

The COURT.—Yes.

[Exceptions to Instructions.]

Mr. LINDSAY.—Before the jury retires, the defendant, I understand, is required to respectfully reserve his exceptions to the instructions given by the Court, which we do, at the request of the Government and on his Honor's own motion; and also to the denial of the Court to give such instructions

as were requested by the defendant and not [83] given, or as were requested and modified. I understand that is the custom.

The COURT.—That is the rule; and as far as the instructions requested by you are concerned, the exception is sufficient. But it is barely possible that in reading some of these instructions for the Government, I may have inadvertently used some phrase that ought to have been left out because I have cut out two of the counts. Your exception wouldn't be good as to that.

Mr. LINDSAY.—I do not expect it to extend that far, your Honor.

The COURT.—Gentlemen, you may retire.

(Jury retired at 11 o'clock A. M.) [84]

The foregoing constitutes all the testimony and evidence introduced and offered upon the trial of the cause, and the entire charge given to the jury by the Court.

BE IT FURTHER REMEMBERED, that before the cause was argued to the jury, the said defendant presented to the Court certain proposed instructions in writing and requested the Court to give the same to the jury, but that the Court refused to give said instructions, or any of them, to the jury, to which refusal of the Court to give said instructions to the jury the defendant duly excepted before the jury retired, and his exception was by the Court allowed, as hereinbefore set forth. The said proposed instructions so requested and refused are as follows, to wit:

[Instructions Requested by Defendant and Refused.]

(a) In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it.

Generally, a conspiracy, such as charged here, must have its formation stage, its period of organization, its preparatory steps to preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and until some act has been done to effect the purpose—some overt act—the crime has not been completed, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime. [85]

(b) I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged

unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and that it was in furtherance of such fully completed conspiracy, and not a part of it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination.

(c) In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely: That at a certain time and place he did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer "Siberia," and that at a certain time and place he did propose to said David G. Powers, and request said David G. Powers, to aid and assist in unlawfully landing in the United States from the steamship "Siberia," in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

You must determine from the evidence, first, whether such acts, or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance [86] of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were actually committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not

overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof.

(d) Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher, alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be considered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant Donaldson it must clearly appear from the evidence that they were co-conspirators, as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher. [87]

Stipulation [and Order Settling and Allowing Bill of Exceptions].

IT IS HEREBY STIPULATED AND AGREED that the foregoing Bill of Exceptions is true and cor-

rect, and that the same may be allowed and settled by the Court.

Dated January 9th, 1913.

BENJ. L. McKINLEY,
Assistant U. S. Attorney and Attorney for Plaintiff.
FRANK R. SWEASEY,
CARL E. LINDSAY,
Attorneys for Defendant.

The above and foregoing Bill of Exceptions is hereby settled and allowed by me this 15th day of January, 1913.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Jan. 16, 1913, at 9:30 A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.
[88]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff and defendant in error, and Robert Donaldson defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said Robert Donaldson, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal] W. B. MALING,
Clerk U. S. District Court, Northern District of
California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District
of California.

Allowed by:

WM. C. VAN FLEET,
United States District Judge. [89]

[Endorsed]: No. 5137. United States Circuit
Court of Appeals for the Ninth Circuit. Robert

Donaldson, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Dec. 24, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [90]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, on the day and at the place within contained.

We further certify that a copy of this Writ was, on the 24th day of December, A. D. 1912, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal]

W. B. MALING,

Clerk of the District Court of the United States for the Northern District of California.

By Lyle S. Morris,

Deputy Clerk. [91]

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Northern District of California, Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America plaintiff and defendant in error and Robert Donaldson, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said Robert Donaldson, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to cor-

rect that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the *United*, the 21st day of December, in the year of our Lord one thousand nine hundred and twelve. [92]

[Seal] W. B. MALING,
Clerk U. S. District Court, Northern District of
California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District
of California.

Allowed by:

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Dec. 24, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [93]

Citation (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to John L. McNab, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of

the United States District Court for the Northern District of California, wherein Robert Donaldson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 21st day of December, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge. [94]

United States of America,—ss.

On this 24th day of December, in the year of our Lord one thousand nine hundred and twelve, personally appeared before me Lyle S. Morris, Deputy Clerk of the United States District Court for the Northern District of California, the subscriber, F. R. Sweasey, and makes oath that he delivered a true copy of the within citation to John L. McNab, the U. S. Attorney, for the Northern District of California this 24th day of December, 1912.

F. R. SWEASEY.

Subscribed and sworn to before me at San Francisco, California, this 24th day of December, A. D. 1912.

[Seal] LYLE S. MORRIS,
Deputy Clerk U. S. District Court, Northern District
of California.

[Endorsed]: No. 5137. U. S. Circuit Court of Appeals for the Ninth Circuit. Robert Donaldson, Plaintiff in Error, vs. The United States of America. Citation on Writ of Error. Filed Dec. 24, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [95]

Citation (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to John L. McNab, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Robert Donaldson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the North-

ern District of California, this 21st day of December, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge.

United States of America,—ss.

On this 24th day of December, in the year of our Lord one thousand nine hundred and twelve, personally appeared before me, Lyle S. Morris, Deputy Clerk of the United States District [96] Court for the Northern District of California, the subscriber, F. R. Sweasey, and makes oath that he delivered a true copy of the within citation to John L. McNab, the U. S. Attorney, for the Northern District of California, this 24th day of December, 1912.

F. R. SWEASEY.

Subscribed and sworn to before me at San Francisco, California, this 24th day of December, A. D. 1912.

[Seal] LYLE S. MORRIS,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 24, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

[Bond.]

KNOW ALL MEN BY THESE PRESENTS:
That I, ROBERT DONALDSON, as principal, and FIDELITY AND DEPOSIT CO. OF MARYLAND, as surety, are held and firmly bound unto the UNITED STATES OF AMERICA in the full and just sum of Two Thousand Dollars (\$2000.00),

to be paid to the said UNITED STATES OF AMERICA; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of December, A. D. 1912.

WHEREAS, at a District Court of the United States for the Northern District of California, in a suit depending in said Court between the UNITED STATES and ROBERT DONALDSON, numbered 5137, wherein said ROBERT DONALDSON was charged with the crime of conspiracy and of the offense of receiving, concealing and facilitating the transportation and concealment after importation of opium, and was thereafter brought to trial on said charge before a jury and was found guilty and sentenced to pay a fine of \$200.00 and to be imprisoned for the term of one year in the Alameda County Jail, in Alameda County, California, and whereas, after such conviction said ROBERT DONALDSON sued out in the United States Circuit Court of Appeals for the Ninth Circuit a writ of error to said District Court for the Northern District of California, and whereas, by an order made by the Honorable JOHN J. DE HAVEN, Judge of the United States District Court for the Northern District of California, on the 5th day of December, A. D. 1912, the said ROBERT DONALDSON has been admitted to bail pending the said determination in said United States Circuit [98] Court of Appeals for the Ninth Circuit of said writ of error, in the sum of Two Thou-

sand Dollars (\$2,000.00) and a Bond for the payment of costs upon said writ of error has been filed in the sum of One Hundred Dollars (\$100.00).

Now, the condition of the above obligation is such that if the said ROBERT DONALDSON shall personally appear and render himself in judgment on the final determination in said United States Circuit Court of Appeals for the Ninth Circuit, of said writ of error at and before the said District Court of the United States aforesaid or whenever or wherever he may be required to answer said judgment and all matters and things that may be adjudged against him, whenever the same may be prosecuted and render himself amenable to any and all Court orders and process in the premises and not depart the said District Court and said District without leave first obtained, and if said writ of error shall be dismissed and he shall appear and render himself in execution under the judgment herein, then the above obligation to be void; else to remain in full force and virtue.

ROBERT DONALDSON. (Seal)
FIDELITY AND DEPOSIT CO. OF
MARYLAND.

By JAMES W. MOYLES,
Its Attorney in Fact. (Seal)

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
United States Commissioner for the Northern District of California, at San Francisco.

Approved:

BENJ. L. McKINLEY,
Assistant United States Attorney.

Approved:

FRANCIS KRULL,
United States Commissioner Northern District of California.

[Endorsed]: Filed Dec. 5, 1912. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [99]

**[Order Extending Time to January 24, 1913, to File
Proposed Bill of Exceptions.]**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON.

Good cause appearing therefor, IT IS HEREBY ORDERED that plaintiff in error, ROBERT DONALDSON, above named, may have to and including Friday, the 24th day of January, 1913, within which to prepare, serve, file and settle his pro-

posed Bill of Exceptions.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 24, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [100]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed one hundred pages, numbered from 1 to 100, inclusive, contain a full, true and correct transcript of the records as the same now appear on file and of record in this office, in the case of the United States of America vs. Robert Donaldson et al., No. 5137. Said Transcript of Appeal having been made and compiled in accordance with "Praeceptum for Transcript," embodied in the said Transcript and the instructions of Frank R. Sweasey, Esquire, and Carl E. Lindsay, Esquire, attorneys for defendant and appellant herein.

I further certify that the costs of preparing and certifying to the foregoing transcript is the sum of Fifty-one Dollars and Eighty cents (\$51.80), and that the same has been paid to me by the attorneys for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the official seal of said District Court this

19th day of February, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

[Endorsed]: No. 2248. United States Circuit Court of Appeals for the Ninth Circuit. Robert Donaldson, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Northern District of California, First Division.

Filed February 19th, 1913.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

**[Order Extending Time (Thirty Days) to File
Record.]**

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES

vs.

ROBERT DONALDSON.

Good cause therefor appearing, IT IS HEREBY ORDERED that plaintiff in error may have thirty (30) days' additional time within which to prepare

and file the Record on Appeal in the above-entitled cause.

Dated: January 20th, 1913.

WM. W. MORROW,

Circuit Judge.

Due service, by copy, of the within Order Extending Time to File Record is hereby admitted this 20th day of January, 1913.

BENJ. L. McKINLEY,

Asst. U. S. Attorney.

[Endorsed]: Original. No. 2248. In the United States Circuit Court of Appeals for the Ninth Circuit. United States vs. Robert Donaldson. Order Under Rule 16 Enlarging Time to File Record Thereof and to Docket Case. Filed Jan. 21, 1913. F. D. Monckton, Clerk. Refiled Feb. 19, 1913. F. D. Monckton, Clerk.

No. 2248

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT DONALDSON,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case comes before this Honorable Court on writ of error under circumstances as follows:

On September 20, 1912, the Grand Jury presented and filed an indictment in four counts in the United States District Court in and for the Northern District of California. The first and third counts thereof charged plaintiff in error, Robert Donaldson, and one Henry Gallagher with conspiracy, as well as with actual participation, in unlawfully importing and bringing certain opium into the United States at the Port of San Francisco. The second and fourth

counts thereof charged plaintiff in error and said Henry Gallagher with conspiracy as well as with actual participation, in unlawfully receiving, concealing and facilitating the transportation and concealment after importation of certain opium known by said parties to have been imported into the United States contrary to law.

On November 25, 1912, plaintiff in error was arraigned and interposed a plea of not guilty whereupon on motion, the trial Court granted a severance of the trial of co-defendant, Henry Gallagher, and ordered that the trial of plaintiff in error proceed. (Trans., pp. 10-11.)

A jury was regularly drawn and empaneled to try the cause and the respective parties introduced evidence at the trial thereof.

At the close of the case for the Government, counsel for plaintiff in error requested that the jury be instructed to render a verdict of not guilty upon the first and third counts of the indictment, involving the allegations of importation and bringing of opium into the United States, which motion was granted (Trans., p. 73), whereupon the trial proceeded upon the second and fourth counts of the indictment which counts charged plaintiff in error jointly with Henry Gallagher as having conspired together and with David G. Powers and Emil Fiedler and others to wilfully, unlawfully and feloniously, receive, conceal and facilitate the transpor-

tation and concealment after importation, of a certain unknown quantity of opium, as also with the actual receiving, concealing and facilitating the transportation and concealment after importation at the City of Oakland, Alameda County, California, of 320 five-tael cans of opium, all of which opium as was alleged, defendant well knew had been previously imported into the United States contrary to law.

After argument of counsel the Court delivered its charge and submitted said cause to the jury for its decision, which after deliberation, rendered a verdict finding plaintiff in error not guilty on the first and third counts of the indictment and guilty on the second and fourth counts thereof. (Trans., pp. 12-13.)

From this verdict of guilty on the second and fourth counts, and the judgment entered thereon, motions for a new trial and in arrest of judgment having been denied (Trans., p. 15), thereafter and on the 15th day of December, 1912, a writ of error was allowed plaintiff in error by the said District Court to this Honorable United States Circuit of Appeals for the Ninth Circuit, for the purpose of obtaining a review of the said case and correcting the errors claimed by plaintiff in error to have been committed by the United States District Court for the Northern District of California, First Division.

Specification of Errors.

For a reversal of the judgment, plaintiff in error urges and relies upon the following specifications of error:

1. That the said District Court committed manifest error in overruling the objections of the attorneys for the defendant, Robert Donaldson, to the questions put by the United States Attorney to the witness, David G. Powers, as follows:

“Mr. McNAB. Q. Mr. Tidwell never spoke to you about this matter until he sent for you after he seized these letters that had gone out from the jail which disclosed Mr. Donaldson’s connection, did he?”

Question objected to on the grounds that it is immaterial and irrelevant, not redirect, is leading, and is based on something that is not in evidence—there is nothing here about letters being seized.

Objection overruled and exception.

A. No, sir.” (Assignment of Errors No. 1, Trans., p. 20.)

“Mr. McNAB. Q. And it was only after he had this positive information in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?”

Question objected to on the same grounds.

Objection overruled and exception.

A. Yes, sir.” (Assignment of Errors No. 2, Trans., p. 21.)

2. That the said District Court committed manifest error in refusing to give the following instructions requested by plaintiff in error, viz:

“In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it.

“Generally a conspiracy, such as charged here, must have its formative stage, its period of organization, its preparatory steps and preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and until some act has been done to effect the purpose—some overt act—the crime has not been complete, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.” (Assignment of Errors No. 3, Trans., p. 21.)

“I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and not a part of it; that such overt act must not be one of a

series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination." (Assignment of Errors No. 4, Trans., p. 22.)

"In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely, that at a certain time and place, he did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer 'Siberia,' and that at a certain time and place he did propose to said David G. Powers and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship 'Siberia' in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

"You must determine from the evidence, first, whether such acts or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were actually committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof." (Assignment of Errors No. 5, Trans., p. 23.)

“Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be considered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant Donaldson it must clearly appear from the evidence that they were co-conspirators as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond a reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher.” (Assignment of Errors No. 6, Trans., p. 24.)

3. That the said District Court committed manifest error in giving to the jury the following instructions which were duly excepted to by plaintiff in error, viz:

“When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all and is binding upon all,—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any one of these

parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on the trial before you.” (Assignment of Errors No. 7, Trans., p. 25.)

“You are instructed that it is not necessary that the conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of these offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged.” (Assignment of Errors No. 8, Trans., p. 25.)

“If upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count or in the actual concealment of the opium alleged in the fourth count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant.” (Assignment of Errors No. 9, Trans., p. 26.)

4. That the said District Court committed manifest error in denying, refusing and overruling the defendant’s motion for a new trial herein. (Assignment of Errors No. 10, Trans., p. 26.)

5. That the said defendant, Robert Donaldson, was not convicted herein by due process of law. (Assignment of Errors No. 13, Trans., p. 27.)

6. That the verdict of the jury herein upon which the judgment against the defendant, Robert Donaldson, was based is contrary to law, and contrary to the evidence adduced at the trial of said Robert Donaldson. (Assignment of Errors No. 14, Trans., p. 27.)

7. That the evidence adduced at the trial of the said defendant, Robert Donaldson, was insufficient to support the said verdict of conviction or the said judgment so rendered upon said verdict of conviction. (Assignment of Errors No. 15, Trans., p. 27.)

8. That the evidence adduced at the trial of said defendant, Robert Donaldson, on which the verdict of conviction against him was rendered and the judgment of conviction based, consisted entirely of the testimony of accomplices, and by reason thereof the said District Court committed manifest error in refusing to give the following instruction requested by the said defendant, viz:

“I charge you that the testimony of a co-conspirator or an accomplice ought to be viewed with distrust. You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. When it is supported in material respects you are bound to credit it, but where it is uncorroborated, you are not to rely upon it, unless after the exercise of extreme caution it produces in your minds the most positive conviction of its truth.” (Assignment of Errors No. 16, Trans., p. 28.)

It will readily be seen from the above specifications of errors that there are two main questions involved in this review:

First, the introduction of evidence, over the objections of plaintiff in error, relating to certain letters written out of the Alameda County Jail by one Emil Fiedler;

Second, the charge of the trial Court to the jury with reference to the subject of conspiracy and the essentials of an overt act thereunder.

Argument.

I.

ADMISSION IN EVIDENCE OF PRETENDED CONTENTS OF FIEDLER LETTERS.

There were but three witnesses on the part of the Government as to the circumstances set forth in the indictment, to wit: David G. Powers, Emil Fiedler and the Chinese boatswain Young Tai. All of these witnesses, according to the allegations of the indictment, as well as the testimony of witness Powers, were co-conspirators and accomplices of plaintiff in error. The testimony of the witness Fiedler, who did not personally know plaintiff in error at all, had never spoken with him in his life (Trans., p. 65), connected plaintiff in error with the alleged offense, solely by means of a statement made to him by David Powers that a man by the name of "Bob Donaldson" was a party to the

transaction (Trans., p. 61), and by simply having overheard a question asked of Powers by Young Tai the Chinese, "Is Donaldson all right?" (Trans., pp. 61, 66). The third witness for the Government, Young Tai, the Chinese boatswain, who, it is claimed by the Government, furnished the opium which was the subject matter of the alleged conspiracy, flatly denied that he had any opium, denied that he told anyone that he had any opium or would give anyone any opium and flatly denied that he did give anyone any opium or put any opium anywhere. (Trans., p. 72.)

The testimony of these three witnesses who, under circumstances most favorable to the Government, were but co-conspirators and accomplices of plaintiff in error, was not only in itself contradictory as above indicated and in further particulars hereinafter referred to, but at the same time, utterly lacked any corroboration whatsoever except such as was interjected into this case over the objections of plaintiff in error and the introduction of which is now assigned as error.

That the case for the Government as presented by these witnesses did receive corroboration from this impertinent evidence, there can be no question. In fact, the corroborative matter concerning the pretended contents of certain intercepted letters written by Emil Fiedler while in jail and after sentence, interjected into the case by questions propounded to the witness Powers, and by statements

made to the jury by the learned United States Attorney in his closing address, far transcended in probative value, any story that did or could have come from the lips of David Powers, the alleged co-conspirator and self-confessed accomplice in this certain alleged unlawful transaction in opium. In this connection, we most earnestly request this Honorable Court to carefully weigh the following extraneous matter thus engrafted onto this case by learned counsel in an overly ambitious desire to corroborate the story told by witness Powers, which corroborative matter was in and of itself, by far the most conspicuous element in the Government's case and unquestionably the most persuasive circumstance in bringing about the verdict rendered herein.

"Q. I understand certain letters were written by Mr. Fiedler in jail? A. Yes, sir.

Q. That is the way in which your connection with these people was learned? A. Yes, sir.

Q. You were subsequently brought before the Grand Jury because of those facts and brought face to face with them? (The last question being withdrawn upon objection made by attorneys for plaintiff in error.) (Trans., pp. 41-42.)

"Mr. McNAB. Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail which *disclosed Mr. Donaldson's connection*, did he?"

Objected to on the grounds that it is immaterial and irrelevant, not redirect, is leading, and is based on something that is not in evi-

dence—there is nothing here about letters being seized.

The COURT. I will overrule the objection.

The WITNESS. What was the question?

(Question read by the reporter.)

Note our exception.

A. No, sir.

Mr. McNAB. Q. And it was only after he had this *positive information* in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?

We object to that on the same grounds.

The COURT. The objection will be overruled. Exception.

A. Yes, sir.” (Trans., pp. 56-57.)

“Mr. McNab closed the argument for the Government. During the course of Mr. McNab’s argument, he made the following statement: ‘Letters were pouring out of the jail, which *letters were intercepted and which fixed the guilt upon these parties*’.

We object to the statement just made by the District Attorney and assign it as error, the statement in which he refers to letters pouring out of the jail, which were intercepted and which fixed the guilt upon these parties; no such evidence is before the jury.

Mr. McNAB. I examined the record, if your Honor please, and had the reporter transcribe a portion of it, from the testimony of Mr. Powers, and it was just as I expected to find it—that letters had been written out of the Oakland jail by these parties and had been intercepted, and that is how the authorities discovered the connection of these parties to this crime. I think, in order to settle the controversy, it would be better to read it into the record.

The COURT. Yes.

Mr. McNAB. (Reading):

‘Q. Did Mr. Donaldson have any conversation with you during that period of time relative to whether or not you should talk?

A. Yes, sir. The first time I met Mr. Donaldson after I had been released from jail; I went to him and asked him about Mr. Fiedler’s release; Mr. Donaldson said he didn’t want to show his hand; I told him my father was willing to go half of the bail for Mr. Fiedler; Mr. Donaldson would not show his hand, he said.

‘Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail *which disclosed Mr. Donaldson’s connection*, did he?’ And then after an objection and the objection being overruled, the witness made the answer:

‘A. No, sir.’

I think, gentlemen, that ought to dispose of that.

Mr. LINDSAY. We still insist upon our objection, that no such letters are evidenced and that no such letters are before this jury or Court.

The COURT. That is very true; the letters themselves are not in evidence.

Mr. McNAB. But *what they disclosed, gentlemen, is in evidence, and it stands undenied before you.*” (Trans., pp. 85-86.)

Where in the entire record in this case is there anything to be found more cogent in its influence upon a jury than those oft-repeated references to letters and their contents, made by the United States Attorney in that most earnest and forceful manner so characteristic of him? Those statements contained in the foregoing leading questions to the

effect that Mr. Tidwell, the Government agent, had seized letters "that had gone out from the jail which disclosed Mr. Donaldson's connection", and furnished him with "positive information" "relating to Mr. Donaldson and Mr. Gallagher", followed by the statement in the closing address to the jury that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties".

The fact that these letters and their pretended contents were given such prominence at the trial and were dwelt upon with such minuteness of detail, is a circumstance clearly indicative of a firm belief then entertained by the United States Attorney, in their efficacy to bring about a verdict. His witnesses were not of his own choosing, they came before the jury discredited by their own testimony; however, in these letters he found a badge of respectability to which to pin the fate of his case, something which to the jury at least, was intrinsically innocent and undesigned, to corroborate and substantiate that which otherwise was contaminated and untrustworthy.

There can be no question as to the materiality and probative force of these statements, there remains but the single question as to how far the statements of the United States Attorney were justifiable and to what extent, if at all, the pretended contents of these letters was admissible in evidence as against plaintiff in error.

As indicating our position upon this question and as disclosing a serious infringement of the rights of plaintiff in error, we specify the following as the grounds relied upon:

First. The statement of Mr. McNab to the jury that letters were "pouring" out of the jail is not substantiated by the evidence, neither can support be found therein for his statement to the jury that letters had been written out of the jail by "these parties" (Trans., p. 85), the evidence in fact showing merely that more than one letter had been written out of the jail by Emil Fiedler. (Trans., p. 41.)

Second. The questions put by Mr. McNab to witness Powers (Trans., pp. 56-57), were decidedly leading and in their nature partook far more of the testimony of the worthy United States Attorney and his credibility, than that of his witness.

Third. The oral testimony concerning these letters was an admission of secondary evidence to prove their contents while the letters themselves, the best evidence, were withheld. That the alleged contents of these letters was before the jury, although the letters themselves withheld, we assume to be unquestioned in view of Mr. McNab's statement to the jury in his closing argument, in reply to our objections that the letters were not in evidence, "But what they disclosed, gentlemen, is in evidence, and it stands undenied before you." (Trans., p. 86.)

Fourth. The conclusions to be found in Mr. McNab's leading questions and statements to the jury, viz: "fixed the guilt upon these parties" (Trans., p. 85); "disclosed Mr. Donaldson's connection" (Trans., p. 56); furnished Mr. Tidwell "positive information" "relating to Mr. Donaldson and Mr. Gallagher" (Trans., p. 57), were unjustifiable, even conceding the contents of the letters referred to, to be themselves properly admissible and binding upon plaintiff in error. In such case the letters themselves should have been presented to the jury that they might draw their own conclusions therefrom. Mr. McNab in forcing upon the jury his own conclusions drawn from these letters, while withholding the letters themselves, can be properly characterized in no other manner than a usurpation of the functions of the jury.

Fifth. The letters themselves were not admissible. The contents thereof was not binding upon plaintiff in error for any purpose whatsoever and all reference thereto, whether in the leading questions objected to or in statements made during the closing argument to the jury, constituted irreparable injury to defendant's cause.

The offence is charged in the indictment as having taken place between December 1 and 13, 1911. Mr. Fiedler testified that he was arrested for the offence December 4 or 5, 1911. (Trans., p. 58.) He and Powers were sentenced to be imprisoned February 3d of the following year. (Trans., pp. 41, 49.)

It was not until sometime after Mr. Fiedler was in jail, and months after the alleged conspiracy and crime were consummated, that he wrote the letters in question. The statements contained in such letters were in no manner in aid or execution of any asserted conspiracy nor were they in furtherance of any of its objects, they were at best nothing more nor less than a recital of past events and binding upon no one other than the writer himself.

Upon this subject Wharton's Criminal Evidence (10th Ed.), Vol. II, Sec. 699, says:

“When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the other.”

To same effect is II Wharton's Criminal Law (11th Ed.), Sec. 1673, and Underhill's *Crim. Ev.* (2d Ed.), Sec. 493.

In *Logan v. U. S.*, 144 U. S. 263, 309, Mr. Justice Gray, speaking for the Court, said:

“The Court went too far in admitting testimony on the general question of conspiracy. Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *U. S. v. Gooding*, 12 Wheat. 460, 469. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspira-

tor by way of narrative of past facts, are not admissible in evidence against the others.”

The United States Courts, as well as the Supreme Court of California, has repeatedly expressly applied this doctrine to circumstances such as are here presented:

Brown v. United States, 150 U. S. 93;
 Ex Parte Black 147, Fed. Rep. 832, 840;
 Dwinnell v. United States, 186 Fed. Rep. 754;
 Goll v. U. S., 166 Fed. Rep. 419;
 Sorenson v. U. S., 143 Fed. Rep. 820; 168 Fed.
 Rep. 785;
 Hauger v. U. S., 173 Fed. Rep. 54;
 Tresca v. U. S., 183 Fed. Rep. 736;
 People v. Irwin, 77 Cal. 494-504;
 People v. Oldham, 111 Cal. 648-52;
 Del Campo v. Camarillo, 154 Cal. 647.

In this connection and as to the alleged contents of these letters, it must be borne in mind that Emil Fiedler, the writer thereof, testified that he did not personally know plaintiff in error at all, had never in his lifetime spoken with him (Trans., p. 65), and connected plaintiff in error with the alleged offense solely by means of a statement made to him by David Powers that a man by the name of “Bob Donaldson” was a party to the transaction (Trans., p. 61), and by simply having overheard a question asked of Powers by Young Tai, “Is Donaldson all right?” (Trans., pp. 61, 66.)

Any statement which Fiedler may have made in these letters in any way connecting plaintiff in error, must necessarily therefor have been merely what someone else had told him and therefore under the circumstances of the present case, hearsay evidence twice removed.

The testimony of Mr. Fiedler was to the effect that he knew nothing at first hand of plaintiff in error whatsoever, yet the United States Attorney in the leading questions objected to, told the jury that these letters written by Fiedler "disclosed Mr. Donaldson's connection" (Trans., pp. 56, 86); that Mr. Tidwell had this "positive information in these letters relating to Mr. Donaldson and Mr. Gallagher" (Trans., p. 57), and in his closing address to the jury told them that what these letters "disclosed" "is in evidence and it stands undenied before you" (Trans., p. 86), and that these letters "fixed the guilt upon these parties". (Trans., p. 85.)

That these letters, written by an alleged co-conspirator months after the alleged joint venture was consummated, were themselves inadmissible we deem unquestionable, yet how infinitely stronger and more persuasive was the method adopted by the United States Attorney with regard to these letters than would have been their simple introduction in evidence. If the letters contained no more than what was testified to by witness Fiedler as to his entire knowledge of plaintiff in error, they would have

in no sense constituted the "positive information" for the benefit of Mr. Tidwell, nor would they have "fixed the guilt upon" plaintiff in error. If these letters contained more than what was testified to by witness Fiedler as his entire knowledge of plaintiff in error, it would have involved the Government's witness in a most serious contradiction. In either case, however, the jury would not have had the credibility of the worthy United States Attorney to support them nor the benefit of his many eloquent conclusions therefrom to aid them in reaching their verdict.

We most earnestly submit that upon this first proposition alone, concerning the wrongful admission in evidence of the alleged contents of these Fiedler letters, sufficient has been shown to disclose grievous injury to defendant's cause and by reason of which alone he is clearly shown to be entitled to a new trial.

II.

CHARGE OF COURT AS TO CONSPIRACY AND OVERT ACT.

The second question presented upon this review involves the Court's charge to the jury with respect to the subject matter of conspiracy and the essentials of an overt act thereunder. (Assignments of Error 3-9, Trans., pp. 21-26.)

The first and second counts of the indictment were drawn under the provisions of section 5440, Re-

vised Statutes of the United States, which read as follows:

“If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable, etc.”

It will be seen from a simple reading of this statute that the provisions thereof contemplate two elements as essential to an offence thereunder: First, the agreement constituting the conspiracy, and second, the overt act in furtherance of the objects of and following such completed conspiracy.

While it is true that many of the early decisions made rather light of the overt act, adopting the conspiracy as constituting the real offence, yet all question as to the relative importance of the overt act has been for all time set at rest by the recent decision of the United States Supreme Court in *Hyde v. United States*, 225 U. S. 347-57, where the Court speaks as follows:

“It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime and that the requirement of an overt act does not give the offence criminal quality or extent, but that the provision of the statute in regard to such an act merely affords an opportunity to withdraw from the design without incurring its criminality.—Indeed it must be said that the cases abound with statements, that the conspiracy is the ‘gist’ of the offence or the ‘gravamen’ of it, and we realize

the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by Sec. 5440. It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but Sec. 5440 has gone beyond such rigid abstractions and prescribes, as necessary to the offence, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object, and provides that when such act is done 'all the parties to such conspiracy' become liable. Interpreting the provision, it was decided in *Hyde v. Shine*, 199 U. S. 62, 76, that an overt act is necessary to complete the offence. * * * It seems like a paradox to say that anything, to quote the Solicitor General, 'can be a crime of which no Court can take cognizance'. The conspiracy, therefore, cannot alone constitute the offence. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it, cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction."

We have thus under consideration an offence consisting of two equally essential elements, conspiracy and overt act. This overt act in order to meet the requirements of the statute must not only be an ingredient separate and distinct from the agreement or conspiracy, but at the same time must be a subsequent, independent act following a completed com-

ination and done to carry into effect the object of such original combination.

“Generally, a conspiracy, such as that charged here, must have its formative stage, its period of organization, its preparatory steps and preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such time, and until some act has been done to effect the purpose—some overt act—the parties may abandon the conspiracy and be held guiltless of the offence.—Let us apply these legal principles to the case at bar, keeping in mind the duty of distinguishing between the conspiracy and the open acts done in furtherance thereof.” (Conspiracy contemplated fraudulent entries upon Government lands. Defendants secured sixteen persons and explained plot to them after which they agreed to make such entries, etc., and agreed to turn over titles thus acquired upon receiving so much per head and expenses.) “Now the practical question is whether, under such circumstances, the pleader is at liberty to adopt as an overt act the bargaining with the entrymen and the payment to them of the agreed stipend. Enough has appeared to brand the entrymen as co-conspirators. They were not innocent tools in the hands of the defendants to do some ministerial act. * * * Suppose they had been joined as defendants, as they might have been, and the indictment had outlined the entire conspiracy, the bargaining with the entrymen and the payment to secure their adherence would have been an essential part of the plot, really an enlargement of the conspiracy and not partaking of the nature of an overt act. A payment of \$500.00 in advance to defendant was so treated in *United States v. Babcock*, 3 Dill 581, Fed. Cas. No. 14487. The agreement of the sixteen

entrymen to co-operate was an essential part of the combination underlying this crime. The bargaining with them was an integral part of the secret plot. Thus far everything rested in agreements, and was relevant to the conspiracy."

Ex Parte Black, 147 Fed. Rep. 832-37.

"The crime charged against the defendants is a statutory offense and all the essentials required by the statute to constitute the offense must be proved before a conviction can be had, and under the statutes there must be not only a conspiring together by the parties to commit the offence, but to complete the offence denounced by the statutes, the formation of the conspiracy must be followed by the act charged in the indictment to have been done to effect its object, for otherwise the offence would not be made out. * * * This act, to effect the object of the conspiracy, must not be an act which is a part of the conspiracy. It must not be one of a series of acts, constituting the agreement or conspiring together, but it must be a subsequent, independent act, following a completed conspiracy, and done to carry into effect the object of the original combination."

United States v. Cole, 153 Fed. Rep. 801-3.

The same principle is announced in the following cases:

United States v. Richards, 149 Fed. Rep. 443-46;

United States v. Hirsch, 100 U. S. 33-34;

Hyde v. United States, 225 U. S. 347;

United States v. Milner, 36 Fed. Rep. 890;

United States v. Reichert, 32 Fed. Rep. 142.

In applying the principle of the foregoing decisions to the case at bar it becomes necessary briefly to refer to the character of the overt acts here charged.

The indictment, after alleging that Henry Gallagher and Robert Donaldson did unlawfully and feloniously conspire and agree "together and with one David G. Powers and one Emil Fiedler" and others, sets forth and designates two acts on the part of plaintiff in error as constituting the necessary overt acts, as follows:

First. The said Robert Donaldson "did propose to said David G. Powers, and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship 'Siberia', in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes".

Second. The said Robert Donaldson "did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer 'Siberia', the names of which said last named persons are, to the grand jurors aforesaid, unknown".

We are thus presented with an indictment which, while at the same time expressly charging David Powers with having been a co-conspirator with plaintiff in error in the opium business, yet designates and relies upon the very first conversation in which opium was referred to, held between them (Trans., pp. 31-32) as constituting an overt act un-

der the provisions of this statute. During this first interview also, according to Government's witness Powers, plaintiff in error took Powers aboard the steamer "Siberia" and introduced him to Young Tai, the Chinese boatswain, another conspirator. (Trans., p. 32.) This simple introduction of one alleged conspirator to another, a mere preparatory step or preliminary arrangement, is thus relied upon as the second overt act, even though, according to Government's witness Powers it antedated any mention of the name of co-defendant Gallagher or any suggestion of the plot to co-conspirator Fiedler (Trans., p. 34) and prior to any knowledge on the part of Powers or Donaldson as to how much, *if any*, opium was in the possession of the Chinese, Young Tai (Trans., p. 32), to whom he was thus introduced.

If at this point the scheme had been immediately abandoned and no steps had ever thereafter been taken looking to the actual concealment or landing of the opium, we feel safe in asserting that counsel for the Government would not then be here contending that the parties herein named were guilty of a completed conspiracy under the statute. Yet, if the Government's contention be true and the acts under consideration really constituted "overt acts" under the statute, the defendant was as guilty after his introduction of Powers to the Chinese boatswain, as after the actual landing of the opium, for the crime is consummated by the "overt act".

In this connection it must be borne in mind that the boatswain was not merely an innocent tool to whom had been delegated the performance of some ministerial act. According to the testimony of both witnesses Powers and Fiedler, he was an essential and necessary co-conspirator. Had he been expressly joined as one of the defendants herein and had the indictment outlined the entire conspiracy, then this mere introduction of Powers to the boatswain by Donaldson would clearly appear in its true character, an essential part of the plot and one of the series of acts constituting the agreement or conspiring together.

Thoroughly convinced that these two alleged transactions were, if true, but a part and parcel of the preliminary conspiring together, we requested of the Court, but were refused, the three following instructions:

“In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it. Generally, a conspiracy, such as charged here, must have its formative stage, its period of organization, its preparatory steps and preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and

until some act has been done to effect the purpose—some overt act—the crime has not been completed, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.” (Requested Trans., p. 95; Assignment of Errors No. 3.)

“I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and that it was in furtherance of such fully completed conspiracy, and not a part of it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination.” (Requested Trans., p. 95; Assignment of Errors No. 4.)

“In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely: That at a certain time and place he did introduce one David G. Powers to the boatswain and the engineer’s cabin boy of the steamer ‘Siberia’, and that at a certain time and place he did propose to said

David G. Powers, and request said David G. Powers, to aid and assist in unlawfully landing in the United States from the steamship 'Siberia', in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

You must determine from the evidence, first, whether such acts, or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were actually committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof." (Requested Trans., p. 96; Assignment of Errors No. 5.)

The Court not only refused to charge the jury in accordance with the foregoing requested instructions, thus leaving to the jury the determination of the question as to whether or not the two transactions alleged were in fact overt acts under the statute, but by the three following instructions given by the Court, entirely withdrew such question from the jury and in effect directed them that the transactions alleged in the indictment were, as a

matter of law, sufficient "overt acts" whereby to convict defendant under the statute.

"When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all and is binding upon all,—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that *any one of these parties did any of the overt acts alleged in the indictment*, it will be your duty to find a verdict of guilty against the defendant on the trial before you." (Given Trans., p. 87; Assignment of Errors No. 7.)

"You are instructed that it is not necessary that the conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that *any one of the parties committed any overt act* in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged." (Given Trans., p. 88; Assignment of Errors No. 8.)

"If upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the Second Count or in the actual concealment of the opium alleged in the Fourth Count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of

the defendant.” (Given Trans., p. 92; Assignment of Errors No. 9.)

The first instruction above quoted as given by the Court, directing the jury that if they found “that *any one* of these parties did *any of the overt acts* alleged in the indictment, it will be your duty to find a verdict of guilty”, constituted not only a refusal on the part of the Court to instruct the jury as to the nature of an overt act as was requested, but was a withdrawal of such question entirely from the jury and a direction to them that each of the overt acts alleged in the indictment was, if true, as a matter of law, fully adequate to convict.

The second instruction given as above, directs the jury that if they found from the evidence “that *any one* of the parties committed *any overt act* in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged”. By such instruction the jury was not even limited in their considerations, to the overt acts alleged in the indictment, nor were they confined to overt acts committed by those first found to be co-conspirators of plaintiff in error. A verdict is directed whenever the jury shall have found that *any one of the parties* committed *any overt act* in furtherance of the conspiracy whatever, and leaves the jury entirely free to determine what acts constitute “overt acts”, without any instruction as to their requisites.

The third instruction above quoted as given by the Court over the objection of the defendant, loses sight of the overt act entirely. The jury is therein instructed that it is their duty to return a verdict of guilty "if upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count".

In addition to the two alleged "overt acts" which we have heretofore had under consideration, the indictment specifies a third act as follows:

In furtherance of said conspiracy and to effect the object thereof the said Henry Gallagher "did go with the said David G. Powers, from the City and County of San Francisco, to the City of Oakland, in the State and District aforesaid".

Fully realizing that the testimony connecting plaintiff in error with Henry Gallagher was in every respect weaker and far less satisfactory in its nature than that connecting plaintiff in error with either Powers or Young Tai, the boatswain, resting as it did entirely upon the naked statements of Powers alone, we requested of the Court the following refused instruction:

"Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher, alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be con-

sidered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant Donaldson it must clearly appear from the evidence that they were co-conspirators, as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher.” (Requested Trans., p. 97; Assignment of Error No. 6.)

The Court not only refused to give the foregoing instruction, thus limiting the considerations of the jury upon such point to such overt acts only as were committed by persons first found to be co-conspirators, but in the instructions complained of in Assignment of Errors No. 7 as given (Trans., pp. 87-88), directed the jury to find a verdict of guilty against the defendant when they should have found “that *any one of these parties* did *any of the overt acts* alleged in the indictment”. This injury to plaintiff in error’s cause was also greatly aggravated by the instruction complained of in Assignment of Errors No. 8 as given by the Court (Trans., p. 88), wherein the Court directed the jury that it was their duty to find defendant guilty as charged if they first found merely “that *any one of the par-*

ties committed *any overt act* in furtherance of the conspiracy”.

We respectfully submit that the trial Court's charge to the jury upon the subject matter of conspiracy and the essentials of an overt act thereunder, whereby plaintiff in error was charged with all of the acts of all the various parties, without confining such acts to those alleged in the indictment or to those of parties first shown to have been co-conspirators with him, was alone sufficiently violative of defendant's rights as to justify a reversal of this case. When to this be added the statements of counsel for the Government, under the sanction of the Court, that the complicity of plaintiff in error in these acts of Powers and Fiedler, as well as his ultimate guilt, were fully established by certain existing letters, the contents of which was in evidence, this conclusion becomes inevitable.

Conclusion.

There is no question but that Powers and Fiedler were engaged in transporting opium to Oakland where they were apprehended by the authorities with opium in their possession. It is also true that the stories told by Powers and Fiedler as to the details of the transportation across the bay and their subsequent adventures on the other side, are reasonably consistent with one another. However,

the stronger and more minute in detail these narratives of the actions of others were, the more injurious to defendant's cause became the Court's action complained of, in permitting the jury to be told, in substance at least, that their guilt was the guilt of plaintiff in error. This in effect, was the result of allowing the statements to be made to the jury that certain letters, the contents of which was in evidence, "disclosed Mr. Donaldson's connection", furnished "positive information relating to Mr. Donaldson and Mr. Gallagher", and "fixed the guilt upon these parties". This result was also in large measure contributed to by the instruction of the Court with reference to the "overt act", that all was necessary for conviction was that the jury should find "that any one of the parties committed any overt act in furtherance of the conspiracy". Through such procedure the complicity of plaintiff in error, in all of these matters, was established to the satisfaction of the jury, without the aid of any legally competent testimony whatsoever.

When we turn from this extraneous matter improperly interjected into this case for the sole purpose of showing complicity of Mr. Donaldson, and examine the records for legal evidence, tending in any degree to connect him with the particular undertaking in which Powers and Fiedler were engaged while on their voyage to Oakland, we find nothing that in any way can be compared in probative force, to these oft-repeated references to the Fiedler letters.

As has already been stated the entire evidence in this case connecting plaintiff in error with the particular transaction in opium carried on by Powers and Fiedler, rests almost, if not entirely, upon the testimony and statements of witness Powers.

The testimony of Young Tai, the boatswain, did not connect plaintiff in error with this particular transaction at all. He testified merely that plaintiff in error first came to him with Powers, told him that Powers was a good man and to give him the opium (Trans., p. 69), yet returned alone and told him "not to give it to that man, give it to me" (Trans., p. 70). The boatswain, however, positively testifying that during all such time he had no opium, that he told no one he had opium and gave no opium to any one (Trans., p. 72). The probative value of this man's testimony, if of any value whatever in connecting plaintiff in error with the particular transaction in opium carried on by Powers and Fiedler, dwindles into insignificance in view of the irresistible suggestions read into this case over defendant's objections and now assigned as error.

The witness Fiedler testified that he knew nothing whatsoever at first hand, of plaintiff in error. He testified that Powers told him that a man named Bob Donaldson was in the plot. This use of an influential name by Powers was, however, necessary to induce Fiedler to co-operate with him, for as testified to by Fiedler, he refused to go into this

plot until this name was used, after which, "it looked easy to me" (Trans., p. 59). Fiedler testified also that he heard the name of Donaldson subsequently used at an interview with Young Tai, the boatswain, when Young Tai inquired of Powers, "Is Donaldson all right?" (Trans., pp. 61, 66). In view of Power's testimony that Mr. Donaldson had, prior to this conversation, already proposed the project to him (Powers) and had taken him aboard the "Siberia" and introduced him to Young Tai, the man with the opium (Trans., pp. 31-32) with whom of course, under this theory, Donaldson must have had a certain intimacy, is it not strange that Young Tai should ask Powers, this new found acquaintance, whether his own confederate, Donaldson, was all right? If through curiosity, provoked by this anomalous question, we examine the record in this particular, a little more minutely, a strange inconsistency in the Government's case is presented.

According to the testimony of both Powers and Fiedler, Powers first interviewed Fiedler with reference to opium on Saturday (Trans., pp. 60, 49). At the conclusion of this first conversation between Powers and Fiedler, Powers said "all right meet me tomorrow morning and I will give you an introduction to the parties" (Trans., 59). Fiedler met Powers the next morning (Sunday morning), was taken aboard the "Siberia" and introduced to Young Tai, the boatswain (Trans., pp. 59, 60, 49).

Now Mr. Powers testified that plaintiff in error met him on Pier 42, where plaintiff in error first

made the proposal to him to go into the opium business after which, "we walked over and went aboard the 'Siberia', and Mr. Donaldson introduced me to Young Tai, who was there" (Trans., pp. 31-32). In this connection, Young Tai, the boatswain, testified that the time when Donaldson thus came to him with the witness Powers was "Sunday, one o'clock" (Trans., p. 68).

According to the testimony of Government's witnesses Young Tai and Fiedler, therefore, Powers had proposed the opium transaction to Fiedler on Saturday and on Sunday morning had introduced Fiedler to the boatswain, Young Tai; both events preceding the alleged transaction of Sunday afternoon when as is claimed, plaintiff in error proposed the alleged plot to Powers and introduced him to Young Tai (Trans., pp. 31-32).

Under this reversal of the order of the alleged transactions, this question, "Is Donaldson all right?", asked of Powers by Young Tai, indicative of a previous intimate relationship with Powers rather than with plaintiff in error, becomes natural and is susceptible of rational interpretation. The use thus made by Young Tai of the name of "Donaldson" in this question asked of Powers, certainly supports Young Tai's testimony that it was not until after this time that Donaldson visited him at all. At the same time, this circumstance is of no more significance and warrants no other or different inference than did the use by Powers of this influential name in the still earlier conversation

with Fiedler, while endeavoring to induce Fiedler to co-operate with him.

As to showing complicity of plaintiff in error in the particular transaction in opium carried on by Powers and Fiedler, the testimony of Powers receives no support from, but is materially discredited by, the testimony of these other Government witnesses. The unsupported testimony of this self-confessed accomplice who went out of his way to lay his story before the Government officials and thereby gained for himself a position as custom's agent (Trans., p. 52), even though it were in no particular discredited by the testimony of the other witnesses, is, however, not such evidence as would appeal to an average jury upon which to justify a verdict such as was here rendered. On the other hand, there was absolutely no alternative left to the jury in this case but a verdict of conviction, in view of the statements of the United States Attorney in his closing address, which statements the jury, under Court sanction, naturally assumed to be true, that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties" (Trans., p. 85) and that what these letters disclosed "is in evidence, and it stands undenied before you" (Trans., p. 86).

We respectfully submit that upon this writ of error, the judgment of the District Court ought of right and according to the law of the land be reversed and a new trial granted, at which time the

defendant in error may still have abundant opportunity to prove its case against plaintiff in error under and in accordance with those well established rules of procedure here invoked, designed to preserve the liberty as well as the lives and property of all of its subjects.

Dated, San Francisco,
May 8, 1913.

FRANK R. SWEASEY,
Attorney for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit.

ROBERT DONALDSON,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

The argument in the brief of plaintiff in error is based upon two general propositions:

First, that the court below committed error in the admission of evidence relating to certain letters written out of the Alameda County Jail by one Emil Fiedler, and

Second, that the court committed error in its charge to the jury with reference to the subject of conspiracy and the essentials of an overt act in furtherance thereof.

The indictment in the case contains four counts. The first charges the plaintiff in error, together with one Henry Gallagher, with having entered into a conspiracy with one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler, and divers other persons whose names are unknown, to fraudulently and knowingly import and bring into the United States at San Francisco in the Northern District of California, certain opium and certain preparations and derivatives thereof, to wit a large amount of opium prepared for smoking purposes, the exact amount of which being to the grand jurors unknown.

The second count charges a conspiracy between the same parties to fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount being unknown to the grand jurors which, as the defendants well knew, was opium which had theretofore been imported into the United States contrary to law from some foreign port or place to the grand jurors unknown.

The third count charges plaintiff in error and Gallagher with fraudulently and knowingly importing and bringing into the United States and assisting in so doing, 320 five-tael cans of opium prepared for smoking purposes, by aiding and abetting,

counselling, inducing and procuring the commission of said offense by Powers and Fiedler.

The fourth count charges plaintiff in error and Gallagher with having fraudulently and knowingly received, concealed and facilitated the transportation and concealment after importation of the same opium described in the third count and that they did so by aiding and abetting, counseling, inducing and procuring the commission of the offense by Powers and Fiedler.

At the conclusion of the evidence on behalf of the Government the court instructed the jury to find plaintiff in error, who alone was on trial, not guilty upon the first and third counts, thereby leaving the second and fourth counts for their consideration, and the jury's verdict found plaintiff in error guilty on the second and fourth counts of said indictment.

I.

In order that we may intelligently discuss the first ground of objection urged by counsel for plaintiff in error, it will be necessary to consider the circumstances under which the evidence complained of was admitted by the trial court. At page 41 of the Transcript of Record, in the direct examination of the witness David G. Powers, the district attorney asked, and the witness answered, without objection, the following questions:

“Q. I understand certain letters were written by Mr. Fiedler in jail? A. Yes sir.

Q. That is the way in which your connection with these people was learned? A. Yes sir.”

These questions were entirely proper and no error could have been successfully assigned upon the asking or answering of either of them, even though counsel had made objection, which he did not.

On cross examination, Transcript page 51, the witness was asked by defendant's counsel when he first spoke to anyone about Donaldson's complicity in this matter. He replied substantially, in answer to questions, that he had told Mr. Tidwell, special agent of the Treasury Department, after he, the witness, had gotten out of jail, after serving a sentence for smuggling; that he had gone to Mr. Tidwell and told him the story he had told in court at the trial.

On page 52 of the Transcript, the witness further stated on cross examination in answer to questions, that Mr. Tidwell had recommended his appointment as a special customs agent before he had told Mr. Tidwell the story about Donaldson's connection with the offense under investigation and that afterwards he had received the appointment. He also testified, and was not contradicted, pages 52 and 53 of the Transcript, that Donaldson had visited him in the Alameda County Jail. The questions on redirect examination to which objection is made were asked for the purpose of explaining to the jury how Mr. Tidwell came to send for the witness and why the witness had made these disclosures to him as to Donaldson's complicity in the matter of smuggling opium. The inference sought to be left by the

cross examination was very evidently that Powers had told this story in order to get employment from the Government through the recommendation of Mr. Tidwell. The questions of the district attorney on redirect examination tended to bring out the fact that Mr. Tidwell had other information and that the witness, on being made acquainted with that fact, had made his disclosures to Mr. Tidwell. In other words, the district attorney sought to show on redirect examination, and quite properly, that instead of the witness being actuated by a motive of attempting to curry favor with the Government to his own pecuniary advantage, as the cross-examination was intended to convey, the story of Donaldson's complicity had been, as it were, forced from the lips of a witness reluctant to tell it, and who only consented to do so when he found that Mr. Tidwell had other information of which the witness was ignorant.

It therefore appears, First, that the questions asked by the district attorney on direct examination for the purpose of showing the method in which Powers' connection with the matter had first been discovered, were asked and answered without the slightest objection on the part of defendant's counsel. Second, that instead of leaving the matter as it then stood, counsel in an endeavor to discredit the witness before the jury, on cross examination sought to leave the inference that Powers was testifying against Donaldson and in favor of the Government in order that he might reap some pe-

cuniary advantage. Third, that the district attorney properly sought to overcome this inference by showing that Mr. Tidwell had never spoken to the witness about the matter until he had sent for him after having seized the letters that had gone out from the jail which disclosed Mr. Donaldson's connection with the criminal enterprise.

No attempt was made, on the part of the Government to introduce the letters in evidence or to read them before the jury and they were only referred to for the purpose of showing the manner in which the witness Powers had come into the case as a witness for the Government.

Objection is made to the closing argument of the district attorney in which he made reference to the testimony which has just been discussed. The portion of the argument complained of is found on pages 85 and 86 of the Transcript of Record. It appears therefrom that in the course of Mr. McNab's argument he said, "Letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties."

We submit that the testimony above referred to fully justified this comment of the United States Attorney. If objection is made to the use of the word "pouring" it may very properly be observed that the evidence showed plainly that more than one letter was written. The fact is that the letters which had been intercepted, be they few or many, disclosed the connection of these parties with

the offense, or, to use the words of counsel for plaintiff in error on his cross examination of Powers, page 51, of the Transcript, disclosed "Donaldson's complicity of this matter."

But the district attorney was eminently fair in his closing argument to the jury for he read in full the testimony which justified the comment which he made. The portion appearing at the bottom of page 85 and in the first four lines of page 86 of the Transcript of Record, as having been read by the district attorney to the jury, is found in the testimony of the witness on page 40 of the Transcript of Record. The remaining questions and answers read by the district attorney to the jury are found on page 56 of the Transcript of Record in the redirect examination of the witness.

With reference to the objection that the form of the questions of the district attorney was leading, it should be remembered that a very large discretion is vested in the trial court in the matter of permitting leading questions, and that a judgment should not be disturbed merely because of the asking of leading questions, unless it very clearly appears that there was a gross abuse of discretion on the part of the trial court. The Transcript in the present case discloses no such state of facts.

A question is not rendered objectionable as leading because it embodies a fact already testified to by the witness; nor is it an abuse of discretion to permit leading questions in regard to matters which

the witness had before testified to in a more specific manner. 40 Cyc. 2432 and cases cited.

A leading question may be put to ascertain the real meaning of a witness who has given an ambiguous answer. 40 Cyc. 2433 and cases cited.

Where it is apparent that a witness has answered a question under a misapprehension as to its meaning, it is not error to allow him to be asked a leading question for the purpose of ascertaining what he in fact meant by his answer. 40 Cyc. 2433 and cases cited.

Even though a question is leading in form, error cannot be predicated upon the refusal to exclude it unless it relates to a material point. 40 Cyc. 2433.

In this connection it may be noted that the point about which these questions were asked was not one which was vital to the question of the guilt or innocence of the defendant upon any of the charges in the indictment. The questions were simply asked for the purpose of negating the idea that the witness Powers had gone to the Government officers with information against the defendant in order that he might benefit himself. It had nothing directly to do with the question of the guilt or innocence of Donaldson upon the charges made against him.

Whether questions assuming facts shall be allowed rests largely in the discretion of the trial

court, whose action may not be disturbed where no abuse of discretion is shown. 40 Cyc. 2435.

It is proper on re-examination to draw from the witness an explanation of his statements on cross examination, or of matters brought out on cross examination. 40 Cyc. 2524.

A witness may be interrogated as to circumstances tending to create wrong impressions which might result from matters brought out on cross examination. 40 Cyc. 2525.

Leading questions may properly be allowed if the purpose is to explain, develop or modify new matter brought out on cross examination. 40 Cyc. 2530.

II.

The second ground alleged by counsel for the reversal of the judgment herein is based upon the charge of the court to the jury with reference to the subject of conspiracy and the overt acts necessary in furtherance thereof.

The indictment, as we have already seen, contained four counts, on two of which plaintiff in error was convicted, one of the counts, the second, being for conspiracy and the other, the fourth, for receiving and concealing and facilitating the transportation and concealment after importation of certain opium. Upon the trial the jury rendered the following verdict, page 13, Transcript of Record:

“We, the Jury, find Robert Donaldson, the defendant at the bar, not guilty on the 1st and 3d counts of the indictment, and guilty on the 2d and 4th counts of the Indictment.”

The judgment of the court (pages 16 and 17 of the Transcript of Record), after reciting the filing of the indictment, the arraignment and plea, the trial, and the verdict of the jury, reads as follows:

“It is therefore ordered, adjudged and decreed that the said Robert Donaldson, having been duly convicted in this court on the 2d and 4th counts of the Indictment herein, be and he is hereby sentenced to be imprisoned for the term of 1 year in the Alameda County Jail, and further, that he pay a fine of \$200, and in default of the payment of said fine, that he be further imprisoned until said fine be paid.”

It will thus be seen that the court pronounced a general judgment upon the verdict. The verdict declared the defendant guilty on the 2d and 4th counts of the indictment, but the judgment did not attempt to apportion the punishment between the two counts, but was general in its form. The judgment pronounced was within the power of the court to impose upon either one of the counts upon which plaintiff in error was convicted. The punishment for conspiracy to commit an offense against the United States, denounced by section 37 of the Criminal Code of the United States, is imprisonment for not more than two years or a fine of not more than \$10,000, or both a fine and imprisonment.

Under section 2 of the Act of February 9, 1909, 35 Stats. at L., 614, under which the 4th count was drawn, the plaintiff in error could have been punished by a fine not exceeding \$5,000 nor less than \$50, or by imprisonment for any time not exceeding two years, or both. It follows, therefore, that if the conviction upon either count of the indictment was correct, the judgment must stand.

Claasen v. U. S., 142 U. S. 140;

Flickinger v. U. S., 150 Fed. 2;

Therefore, even conceding for the sake of argument, what we do not concede as a fact, that all counsel's arguments based upon the instructions of the court upon the conspiracy count of the indictment are sound, it still follows that the judgment must be affirmed because the other count is good and supported by the evidence.

Counsel devotes considerable space in his brief to a discussion of the overt acts charged in the indictment, in an effort to show that certain overt acts therein charged were not properly overt acts in furtherance of the conspiracy, but were part of the conspiracy itself and therefore that the court erred in not giving certain instructions regarding overt acts and their character.

The second count of the indictment contains three overt acts. Counsel objects as to two of them. It must be remembered that it is not necessary under the statute to prove *every* overt act alleged in the indictment. The proof of *any one* of such overt

acts will be sufficient. There can be no question that the third overt act, namely, that "the said Henry Gallagher, on the thirteenth day of December in the year of our Lord One thousand nine hundred and eleven, did go with the said David G. Powers from the city and County of San Francisco, to the City of Oakland, in the State and District aforesaid," (Page 7 of Transcript of Record), was an act in furtherance of the conspiracy and that there was ample evidence upon which the jury could find that said act had been committed. It follows, therefore, that even conceding for the sake of argument, which we do not concede as a fact, that counsel's contentions found on pages 21 to 33 are sound as to two of the overt acts, there is still a third one to which his argument does not apply, and therefore no harm could come to the defendant by the refusal of the court to give the instructions requested. It cannot be said simply because the two acts referred to may not be acts "in furtherance of the conspiracy" but were in fact part of the conspiracy itself (which we do not admit), that therefore no evidence of these acts could be admitted upon the trial. If they were part of the conspiracy it was competent to prove them.

At least one act remains which is not subject to this objection (if objection it be), and the Government was not required to prove every one of the overt acts charged in the indictment. Indeed, counsel expressly admits that such is the law, for in the fourth assignment of error, Transcript of Record

page 22, it appears that he requested an instruction (No. 12) to the general effect that defendant could not be convicted of conspiracy unless the jury found beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purposes therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect *some one of the overt acts charged* was committed as therein stated.

But we respectfully insist that the overt acts charged are in fact acts in furtherance of the conspiracy alleged in the indictment. The first act to which objection is made is the one charging that Robert Donaldson on the tenth day of December, 1911, within the State and Northern District of California, did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer "Siberia." The evidence clearly shows that the defendant Donaldson had actually perfected an agreement with the witness Powers to do the unlawful act some time before Donaldson introduced Powers to the persons named in this count. It also appears affirmatively that the witness Fiedler was an active member of the conspiracy before that time and that he had agreed with the witness Powers to take a part therein. The fact that he had not been personally introduced to Donaldson would not make him less a party to the conspiracy. In the light of the evidence before the court it must be perfectly plain that the agreement to unlawfully receive and conceal and facilitate the transportation

and concealment of the opium had been fully made between these parties before the act hereinbefore described was committed; and if such be the case, such act was unquestionably one in furtherance of the conspiracy. The conspiracy contemplated the unlawful transportation of opium, the importation of which into the United States was forbidden by law. This opium was to be procured and removed from the steamer "Siberia" which plied between ports of the Orient and the Port of San Francisco. The parties, including the plaintiff in error, had agreed that they would go into this enterprise, and as a step toward carrying it out, they went aboard the "Siberia" and Donaldson introduced Powers to the boatswain and the engineer's cabin boy of said steamer.

With reference to the second overt act, the same general observations will apply. It appears in evidence that Donaldson invited Powers generally to go into the "hop business." When this was agreed to, he further proposed, for the purpose of accomplishing the object of this agreement, that Powers assist in unlawfully landing in the United States from the steamship "Siberia," 600 cans of prepared smoking opium. In connection with the discussion concerning these two overt acts and the discussion of the question as to whether these acts are acts in furtherance of the general objects of the conspiracy, it may be observed that it is not necessary that every one of the conspirators mentioned in the indictment should have come into the

conspiracy at the same time, or on the same day, or that they should have met together and formally discussed the means and methods by which the conspiracy was to be carried out. If, as the evidence in this case shows, the defendant Donaldson first approached Powers upon the general subject of opium smuggling, procured the consent of Powers to enter into that unlawful enterprise, and then, after the two had agreed to do so, either had done any act to further the enterprise, such an act would be truly "in furtherance of the conspiracy" as far as Donaldson was concerned, even though none of the other parties had as yet entered into the conspiracy. It appears that afterwards Fiedler was taken into the conspiracy and agreed to perform his part. But this fact would not deprive the acts set forth in the indictment of their character as overt acts in furtherance of the conspiracy and, after the conspiracy had been completely formed, binding upon the persons who were then parties thereto.

It follows, therefore, that the instructions requested by defendant Donaldson upon the theory that these two overt acts were not acts in furtherance of the conspiracy but form a part thereof, were properly refused by the court.

The instructions given by the court to the jury are found on pages 86 to 93 inclusive, of the Transcript of Record and the instructions requested by defendant and refused by the court are found on

pages 95 to 97 inclusive, of the Transcript of Record.

In construing the charge of the court it is a universally recognized rule that the charge must be read as a whole and that every portion thereof must be read in connection with the other portions, with a view to determining whether or not the charge as a whole correctly states the law applicable to the case. It is not required that the court should give all instructions requested by either party precisely as requested, nor is it required that every requested instruction which correctly states the law should be given by the court as requested. If the charge as a whole is fair, and correctly states the principles of law which should govern the jury in their consideration of the evidence, error cannot be predicated upon the refusal of the court to give requested instructions which, although they may state principles correctly, have been substantially given by the court; and if the charge of the court is sufficiently clear so that the jury can readily understand the principles of law which should govern their deliberations, it is sufficient, even though a requested instruction, couched in language which may be technically correct from the standpoint of the lawyer, may not be given in the language in which it is drawn.

The court in charging the jury stated to them, in the first place, that they were required to consider only the second and fourth counts of the indictment and directed them to return a verdict of

not guilty as to the first and third counts. The court then gave a correct definition, in simple language, of the crime of conspiracy, stating that that definition referred to the second count of the indictment in which the conspiracy was charged. The crime of conspiracy was then defined by the court substantially in the language of section 37 of the Criminal Code of the United States. (Transcript of Record page 87). The court then told the jury that ordinarily in the prosecution of the offense of conspiracy the Government was obliged to depend upon circumstantial evidence, but that the present case, according to his understanding, rested upon direct evidence. He stated that it depends upon the direct evidence of the witnesses Powers, Fiedler and the Chinaman Young Tai. After this statement the following instruction was given (Transcript, pages 87 and 88).

“When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all, and is binding upon all—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any of these parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on trial before you.”

This instruction, when taken in conjunction with the rest of the charge of the court, plainly advised the jury that before the act of one conspirator could be taken as the act of all and be binding upon all, the fact of the conspiracy or agreement to commit an offense against the United States must first be established. It further told the jury that the act of one conspirator is only the act of all while the conspiracy is in prosecution and therefore not after the conspiracy had closed or before the conspiracy had been entered into. The instruction further advised the jury that if they found from the evidence to a moral certainty and beyond a reasonable doubt that the conspiracy, as previously defined in the charge, in fact existed between Gallagher and Donaldson to do any of the acts charged in the indictment and if they further found to a moral certainty and beyond a reasonable doubt that any one of these parties did any of the overt acts alleged in the indictment, it would be their duty to find a verdict of guilty against Donaldson, who was on trial. The jury could not have understood that they had a right to find the defendant guilty whether the overt acts alleged were in furtherance of the conspiracy or not, for the reason that the court had already plainly stated to the jury (page 87 Transcript of Record), that it was necessary that one or more of said parties should do an act "to effect the object of the conspiracy." If the jury did not believe that the acts mentioned were for the purpose of effecting the object of the con-

spiracy, they could not have been misled by this charge, because the court had plainly said to them that before a defendant could be convicted of conspiracy, some one of the parties must do some act to effect the object of the conspiracy.

Among the instructions requested by the defendant and refused are instructions (a) and (b), pages 95 and 96 of the Transcript. We submit that while these instructions in the technical sense may be a correct general statement of the law of conspiracy, the substance of them, so far as it was necessary for the jury to understand it, was given in the instructions of the court above quoted and referred to. Requested instruction (a) advises the jury that in order to convict the defendant of the crime of conspiracy as alleged in the indictment, they must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it. Then follows certain language to the general effect that a conspiracy generally has its formation stage, its period of organization, etc., which may consume considerable time before the parties are ready to begin actual open operations and that during such times and until some overt act has been done to effect the purpose, the crime has not been completed and a conviction cannot be had without proof of such overt

act no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.

It is respectfully submitted that the court gave the jury, so far as was necessary, substantially this instruction, couched in far simpler language and far better adapted to the ready understanding of a layman not skilled in the nice distinctions of the law.

Requested instruction (b) advised the jury that they could not convict the defendant under the count for conspiracy unless they found beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. This requested instruction stated further that no overt act charged or proven could be held by the jury as sufficient to establish the offense charged unless they shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy and that it was in furtherance of such fully completed conspiracy and not a part of it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original com-

bination. Stripped of its legal verbiage, this requested instruction simply means that there must first be a conspiracy or agreement between the parties named in the indictment to commit the offense therein described, and that after such agreement is proven to exist some one of the parties must do one of the overt acts charged in the indictment, to carry into effect the object of the conspiracy. Here again, the charge of the court already referred to and quoted, states the substance of this proposition in plain and simple language about which the jury could make no mistake. They must have understood that the overt acts committed by any of the parties to the conspiracy were required to be in furtherance of the object thereof because the court had made that plain in its definition of the crime of conspiracy.

After giving the instruction quoted above, the court proceeded to tell the jury that, in determining the fact as to whether or not a conspiracy was actually formed to commit the offense against the United States described in the indictment, it was their duty to consider all of the facts and circumstances which had been established by the evidence. He further told them that they had a right to take into consideration the relations between the parties as shown by the evidence and all other circumstances which they believed to have been established, and apply to such facts and circumstances their own reason and common sense. This charge, it will be noted, has reference to the proof of the

formation of the conspiracy or unlawful agreement, and is another evidence of the fact that the court's charge fully advised the jury that before proof of an overt act could avail to convict the defendant, it must be shown that the agreement had in fact been made.

The next paragraph of the charge of the court, page 88 of the Transcript of Record, has reference to the function of the jury in considering and weighing the testimony of the defendant. This instruction correctly states the law and, indeed, no exception has been taken to it.

The court next gave to the jury the following instruction (bottom page 88 and page 89 Transcript of Record), to which objection is made by counsel in his brief.

"You are instructed that it is not necessary that the conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged."

We respectfully insist that this instruction is a perfectly correct statement of the law. The principal objection to it seems to be that the court used the words "and that any one of the parties committed any overt act in furtherance of the conspiracy"

instead of confining the overt acts to those charged in the indictment.

In disposing of this objection we must again remember that the charge of the court as a whole must be considered and that it is not either proper or fair to lift one sentence here and there out of the body of the charge and to consider such portion without relation to the rest. The court several times told the jury, and most particularly in the portion of the charge found on pages 87 and 88 of the Transcript, and hereinbefore quoted, that it was necessary that the Government should prove that some one of the parties did some one of the overt acts alleged in the indictment. We think therefore that this sentence of the court's charge could not possibly have been misunderstood by the jury.

With respect to requested instruction (c), found on pages 96 and 97 of the Transcript of Record, we respectfully insist that it does not correctly state the law and was therefore properly refused. It will be remembered that there are three overt acts charged in the indictment as having been done by different parties to the conspiracy in furtherance of the object thereof. In this requested instruction two overt acts alleged to have been committed by the defendant Donaldson in furtherance of the conspiracy are singled out, and the jury is told, in effect, that unless they find that these acts or either of them were actually committed by the defendant and that they were in furtherance of the objects

of the alleged conspiracy, the defendant could not be convicted. This instruction if given would have been misleading and erroneous for the reason that, once the conspiracy is established, not only the acts of Donaldson, but the acts of every other member of the conspiracy, in furtherance thereof, would be proper evidence to be considered in determining the question of the guilt of Donaldson. It therefore would have been highly improper for the court to say that if the jury had a reasonable doubt as to whether these two acts had been committed by Donaldson he could not be convicted. If the jury found that Donaldson had not committed either of these acts in furtherance of the conspiracy, but had found that he was a member of the conspiracy and that Gallagher had committed the third act which is alleged, they would still have been bound to find Donaldson guilty upon the second count of the indictment. For this reason, this requested instruction was very properly refused.

The requested instruction numbered (d) found on page 97 of the Transcript of Record, deals with the third overt act alleged to have been committed by Henry Gallagher in furtherance of the conspiracy charged in the indictment. Counsel by this requested instruction in effect asked the court to charge the jury that no act of Gallagher could be considered as evidence of the guilt of Donaldson unless it had been proven to their satisfaction and beyond all reasonable doubt that Gallagher and Donaldson conspired and agreed together as alleged

in the indictment, and that it was not enough that they should believe that either of these parties had conspired with others.

The charge of the court as given, plainly told the jury that the act of one conspirator was the act of all and binding upon all only when the fact of the conspiracy is established, that is, when the parties had been shown to have entered into the unlawful agreement, and that such acts were only binding upon the parties to the conspiracy while the same was in prosecution. There is no room for any misunderstanding on the part of the jury of the fact that only the acts of the parties to the conspiracy, and these only during the existence of the conspiracy, were binding upon the other parties thereto. They must have understood, therefore, that Gallagher's acts could not bind Donaldson unless Gallagher and Donaldson were co-conspirators.

Taking up again the charge of the court as given to the jury, after the portion last discussed on page 89 of the Transcript of Record, the court gave certain instructions with reference to the fourth count of the indictment. These instructions are found on pages 89 and 90 of the Transcript of Record and no objection has been made to them. Certain instructions then follow as to the burden of proof and the doctrine of reasonable doubt. The tests to be applied to the testimony of the defendant are then substantially repeated, apparently at the request of the defendant. Then follow instruc-

tions upon the question of good character. At the top of page 92 of the Transcript of Record, an instruction was given by the court as follows:

“If, upon consideration of all the evidence to which you have listened, you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count, or in the actual concealment of the opium alleged in the third count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant.”

This instruction is objected to upon the ground that the court says nothing about overt acts therein. In answer to this position, we need simply reiterate what has been stated before, that the charge of the court as a whole must be looked at and that the nature of overt acts and the necessity for their proof have been sufficiently explained by the court in the charges previously given.

From the foregoing we conclude:

1. That the court committed no error in permitting the questions and the references in the argument of the District Attorney, which are complained of in counsel's brief.

2. That the instructions requested by the defendant and refused by the court were, so far as they correctly stated the law, sufficiently and substantially covered by the instructions actually given, and where not so covered were inaccurate and incorrect in their statements of law.

3. That the charge of the court considered as a whole sufficiently advised the jury of the principles of law which were applicable to the charge of conspiracy contained in the second count of the indictment.

4. Even though it be conceded for the sake of argument that all of the objections of counsel to the charge of the Court upon the conspiracy count of the indictment are well founded (which we do not admit), still, in view of the fact that the judgment of the court was a general one and within the court's power to impose upon either of said counts, it must stand, for the reason that there is one count of the indictment about which absolutely no question is raised by counsel in his brief.

For the reasons above stated it is respectfully urged that the judgment of the court below should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

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No. 2248

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT DONALDSON,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In our opening brief we stated that the case for the government, so far as it connects plaintiff in error with the transaction in opium testified to, rests solely upon the credibility of witness Powers. Counsel for defendant in error nowhere in his brief denies or even questions this statement.

Fiedler testified that he did not know plaintiff in error at all, knew nothing of him at first hand, and connected him with the transaction in opium testified to, solely by the use of Donaldson's name by Powers, and having overheard the single question asked of Powers by Young Tai, "Is Donaldson all right"? Young Tai, the Chinese boatswain, not only failed to connect Donaldson in any way whatsoever

with the transaction in opium testified to, but flatly denied that such transaction had ever taken place at all and denied the very existence of the opium in question.

Powers' story, by virtue of which alone, plaintiff in error is in any way connected with the elaborate adventure in opium testified to as having been carried on by Powers and Fiedler, was as follows: Plaintiff in error first approached Powers at Pier 42, proposed that Powers go into the opium business and gained his consent thereto. "So we walked over and went aboard the 'Siberia' and Mr. Donaldson introduced me to Wong Tai, who was there" (Trans. pp. 31-32). That, requiring some one to assist him, he, Powers, then went off the ship and met Mr. Fiedler on the barge Melrose when and where he proposed to Fiedler that he, Fiedler, also go into the opium business (Trans. pp. 33-34). Powers thus testifying that the plot was proposed to him by Donaldson before he approached Fiedler in regard thereto.

This testimony of Powers that the alleged plot was first proposed to him by Donaldson prior to his proposal of the same to Fiedler is, as was stated in our opening brief, flatly contradicted by the testimony of Young Tai and Fiedler, and in his reply brief, the United States attorney, instead of supporting Powers' testimony in this respect, adopts the testimony of the latter witnesses, thereby discrediting Powers upon this most vital point.

Young Tai, the boatswain, testified that it was Sunday afternoon at one o'clock, when Powers and Donaldson came on board the "Siberia" (Trans. p. 68), which visit, as testified to by Powers, immediately followed the alleged first proposal of the opium plot to Powers by Donaldson. Witness Fiedler testified, however, that Powers made the proposal to him, Fiedler, on Saturday and introduced him to Young Tai on Sunday morning (Trans. pp. 59-60-49), both transactions therefore preceding Donaldson's visit to the "Siberia" with Powers at one o'clock Sunday afternoon, and necessarily preceding the alleged proposal of the opium transaction to Powers by Donaldson which, as testified to by Powers, immediately preceded their visit to the "Siberia" with absolutely nothing intervening. In this connection, the United States attorney at page 13 of his brief, states:

"It also appears affirmatively that the witness Fiedler was an active member of the conspiracy before that time (visit of Powers and Donaldson to the 'Siberia') and that he had agreed with the witness Powers to take a part therein."

If Fiedler was an active member of the conspiracy before the visit of Donaldson and Powers to the "Siberia", then Fiedler was an active member of such conspiracy before the alleged proposal of the opium transaction by Donaldson to Powers which immediately preceded it. Furthermore, if these statements by the United States attorney and his other

two witnesses be true, then Powers did not come into this alleged plot through plaintiff in error, as testified to by Powers, neither was there any necessity for an introduction of Powers to Young Tai and, as suggested in our opening brief and not denied, there remains but one rational deduction to be drawn from the question asked of Powers by Young Tai, "Is Donaldson all right"? to-wit: That Donaldson was not the intimate of, nor the man who had made the preliminary arrangements with Young Tai, the man who, according to the government's theory, furnished the opium.

Counsel in his brief for defendant in error, nowhere questions our assertion that nothing is to be found in the entire record more cogent in its influence upon the jury than was this foreign matter concerning the Fiedler letters, yet ignoring the five suggestions with reference thereto, most earnestly advanced by us in our opening as disclosing a most serious infringement of the rights of defendant, he endeavors to justify the introduction and numerous references to the contents of such letters, by the assertion that "they were only referred to for the purpose of showing the manner in which the witness Powers had come into the case as a witness for the government" (brief p. 6).

In the two following paragraphs, however, counsel contends that the testimony concerning these letters (introduced solely for the purpose of showing Powers' connection with the prosecution?) "Fully

justified this comment of the United States attorney", to-wit: that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties" (brief p. 6).

To save this evidence from the numerous infirmities suggested as ordinarily attaching thereto, and at the same time to justify its presentation to the jury, he suggests that its introduction was directed and restricted solely to the question as to how Powers became identified with the prosecution. However, not lacking in ingenuity to meet other and different emergencies confronting him, his very next suggestion is that this evidence (thus carefully restricted as to justify its admission?) thereafter and by virtue of some magic influence, suddenly became emancipated and of such general probative force and effect that it in and of itself "fixed the guilt upon these parties".

Thereafter, not satisfied with his two-page citation from Cyc. to the effect that sometimes, and in certain enumerated instances (in which enumeration, however, the present instance does not appear) leading questions are admissible, counsel proceeds to settle all questions by the most remarkable statement that this point, though justifying the United States attorney in saying to the jury that it fixed the guilt upon these parties, "was not one which was vital to the question of the guilt or innocence of the defendant".

"It had nothing directly to do with the question of the guilt or innocence of Donaldson

upon the charges made against him" (brief p. 8).

We confess that we are not fully satisfied as to how the worthy United States attorney would finally have this Court consider the matter in question. To gain its admission it is restricted to the insignificant role of exonerating witness Powers from an improper motive. To gain a verdict thereby, its significance is magnified to the actual proof of guilt of Donaldson. To justify its admission through leading questions, however, it conveniently shrinks to the insignificant role of having "nothing directly to do with the question of guilt or innocence of Donaldson".

However, utterly disregarding all such inconsistencies, we submit that not one suggestion is set forth in the reply brief which in any way whatsoever contradicts or even qualifies the statement in our opening brief, that this extraneous matter interjected into this case over defendant's objections, was the controlling factor in bringing about the verdict herein rendered, nor is there one valid argument advanced therein, in justification of the admission in evidence of the alleged contents of the Fiedler letters or the frequent and eloquent references thereto made by the United States attorney in his closing address to the jury, which statements, under Court sanction, the jury naturally assumed to be true and, which, unassisted by any legitimate testimony whatsoever, left absolutely no other

alternative with the jury than the verdict of guilty rendered.

We again most earnestly submit that upon this first point alone error of a most serious nature to defendant's cause has been shown, by reason of which alone, plaintiff in error is clearly entitled to a new trial.

As to the second general proposition advanced in our opening, involving the instructions by the trial Court to the jury, we still insist that the alleged proposal of the opium plot to Powers and the immediately succeeding introduction of Powers to Young Tai, both of which acts, according to Powers' testimony, occurred at the very first mention of opium by Donaldson to Powers, were, if true, essentially parts of the alleged conspiracy and in no sense succeeding independent overt acts done in furtherance thereof. The Court therefore deprived defendant of a material legal right in refusing to give the requested instructions "C" (Trans. p. 96) which error was greatly magnified by the erroneous instructions given, the defects of which have been fully pointed out in our opening.

Counsel in an endeavor to convince this Court that the requested instruction "C" did not correctly state the law and was therefore properly refused, materially misstates the substance of such requested instruction. He states (brief pp. 23-24) that said instruction reads, that unless the jury shall make certain findings as to the two overt acts mentioned,

“the defendant could not be convicted”. The conclusion of such requested instructions which counsel thus purports to set forth and from which as so set forth, he endeavors to draw deductions in disparagement thereof, as a matter of fact, reads “the defendant cannot be convicted *on such proof*” (Trans. pp. 96-97). The instruction as requested in no sense limiting the power of the jury to convict upon proof of any other overt acts, which is the sole objection urged by counsel against the validity of such proposed instruction.

A further point is advanced by counsel in reply to this second portion of our argument, as follows: That as the verdict herein rests upon both the second and fourth counts of the indictment, the general judgment rendered thereon must stand, even admitting the existence of errors in the instructions with reference to conspiracy, for, as contended, such judgment is still sufficiently supported by the verdict rendered upon the fourth count, which count, as claimed, is good and supported by the evidence. In support of such proposition counsel for defendant in error cites the case of *Claasen v. United States*, 142 U. S. 140.

In passing upon counsel's suggestion in that behalf, it must be borne in mind first, that throughout the trial there was actually no distinction made between the evidence bearing upon the conspiracy and that bearing upon actual participation in the unlawful act itself. That when the trial Court

coupled the first and third counts of the indictment, in withdrawing them from the jury, it naturally linked the second and fourth counts in the same way, to be sustained or overthrown together. No distinction was made between such counts either in the taking of testimony or in the arguments of counsel. In fact, the charge of actual participation was ignored throughout, the charge of conspiracy at all times being uppermost in the minds of all parties involved. While the Court, in its charge, did but barely refer to the fact that there were two counts involved, yet such point was further and almost hopelessly obscured by the action of the Court when, after directing the jury to return a verdict of not guilty upon the first and third counts of the indictment, it instructed them

“that will leave for your consideration only the second and fourth counts of the indictment, which, in effect, charge the defendant has been guilty of *conspiracy* to secrete opium unlawfully brought into the United States” (Trans. p. 86).

Further answering counsel's deductions drawn from the rule of *Claasen v. United States*, 142 U. S. 140, to-wit: That notwithstanding alleged defects in the instructions concerning conspiracy, the instant judgment finds sufficient support in the verdict rendered on the fourth count, we submit, that the present case falls rather within the principle of the more recent decision rendered by this Honorable Court in *Dwyer v. United States*, 170 Fed. R. 160,

wherein the foregoing decision was distinguished at page 166 thereof, in the following language:

“It is contended by the United States that the judgment being general in its nature, and not exceeding that prescribed for a single offence, the first and third counts charging subornation of perjury with respect to proceedings under Sec. 2 of the timber and stone act, relating to the preliminary proof, are sufficient to support the judgment, and the case of Claasen vs. United States, 142 U. S. 140, is cited as authority upon that proposition. But in that case the Court mentions the fact that the record did not ‘show that any instructions at the trial were excepted to’. In the present case the Court instructed the jury specifically with respect to the charges contained in the fourth, fifth and sixth counts.”

The Court holding that as such instructions were excepted to it follows that the judgment was erroneous as to such fourth, fifth and sixth counts and should be reversed. New trial granted.

With reference further to the efficacy of this verdict upon the fourth count to sustain the judgment rendered, irrespective of the alleged errors in instruction, we direct the Court’s attention to the fact that this verdict rendered upon the fourth count is itself not supported by the evidence. As referred to in our opening brief (p. 3), the fourth count charges defendant with having received, concealed and facilitated the transportation of opium in the following language:

“At Oakland, in the County of Alameda, in the State and Northern District of California,

then and there being, did *then and there* unlawfully * * * That said defendants did commit the offense set forth in this count of this indictment by *then and there* unlawfully, * * * aiding, etc.”

As there is absolutely not one suggestion in the record that defendant was ever in Oakland or Alameda County at all, it certainly has not been shown that he committed any offense “then and there being” or “then and there” aided and abetted this or any offense. While perhaps not impairing the venue of the action, we submit, that such deficiency constituted a material variance between the allegation and proof.

Furthermore, when in addition thereto it is borne in mind, that the government’s case, so far as it tended in any way to connect Donaldson with the transaction in opium described by Powers and Fiedler, rested entirely upon the testimony of Powers; that Powers came before the jury a self-confessed accomplice in crime; that his testimony was utterly lacking in corroboration, save that which was interjected into the case over the objection of plaintiff in error and now assigned as error; that his testimony was flatly contradicted in most vital particulars by the other witnesses for the government, we think that no other reasonable conclusion can be reached but that the frequent and eloquent references to the alleged contents of the Fiedler letters was the one controlling factor in bringing about the verdict herein, yet that such verdict as was rendered, be-

came inevitable by reason of the statements made to the jury by the United States attorney with the express approval of the Court, that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties" and that what these letters disclosed "is in evidence, and it stands undenied before you".

It is in evidence here, and not contradicted, that plaintiff in error has always borne a good reputation and that through energy and application he has won place and distinction for himself in the business world, having been foreman of the Union Iron Works and for the past five years assistant superintendent of the Pacific Mail Steamship Co. (Trans. pp. 75, 80-84).

We most respectfully submit this case to this Honorable Court, fully satisfied that error of sufficient magnitude has been shown, fully authorizing the granting of a new trial herein, and with a firm conviction that this equitable Court will not brush lightly aside the considerations seriously advanced upon this appeal, thereby committing plaintiff in error to prison and wrecking his home and a future life of usefulness and promise, by virtue alone of this uncorroborated testimony of the witness Powers.

Respectfully submitted,

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